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12
 13 **UNITED STATES DISTRICT COURT**
 14 **NORTHERN DISTRICT OF CALIFORNIA**

15
 16 *PORTABLE POWER, INC., on behalf of*
 17 *itself and those similarly situated,*

18 **Plaintiff,**

19
 20 **v.**

21 **ENERGIZER HOLDINGS, INC.; and**
 22 **WAL-MART, INC.,**

23 **Defendants.**

Case No.

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

1 Plaintiff Portable Power, Inc., on behalf of itself and all others similarly situated,
2 brings this action against Energizer Holdings, Inc. (Energizer) and Wal-Mart, Inc.
3 (Walmart) for violating federal and California antitrust and consumer protection laws.

4 Plaintiff's claims stem from agreements between Energizer, the largest
5 manufacturer of disposable batteries sold in the United States, and Walmart, the largest
6 retailer of disposable batteries in the United States, to inflate both wholesale and retail
7 prices for disposable batteries and disposable-battery-dominated lighting products
8 (together "Battery Products") above competitive levels.

9 I. INTRODUCTION

10 1. Faced with a dismal market outlook for disposable batteries, Energizer and
11 Walmart, its largest customer, agreed to a scheme (the "Scheme") to slow price decline
12 and ensure that both companies could charge higher-than-competitive prices for Battery
13 Products.

14 2. The Scheme had two components, to which Energizer agreed under
15 pressure from Walmart.

16 3. First, Energizer agreed to inflate its wholesale prices above competitive
17 levels for Energizer Battery Products to its direct customers other than Walmart. Direct
18 purchasers from Energizer, like Plaintiff Portable Power, compete with Walmart in
19 selling Energizer Battery Products at retail. The resulting wholesale price inflation
20 enabled Walmart to elevate its retail prices for Battery Products above competitive levels.
21 Energizer's inflated Battery-Product prices forced Portable Power and other retailers to
22 charge higher prices at retail than they otherwise would have.

23 4. Second, Energizer agreed to provide Walmart *additional* protection from
24 price competition. Energizer agreed not only to inflate its wholesale prices for Battery
25 Products, but also to require its direct purchasers to charge their retail customers no less
26 than the price Walmart charged for Energizer Battery Products, even if Walmart prices
27 were well above the wholesale prices that the non-Walmart direct purchasers paid
28 Energizer.

1 5. In furtherance of the second component of the Scheme, Energizer created a
2 team known internally as Project Atlas. Project Atlas policed Energizer’s customers’ retail
3 prices and warned retailers that tried to undersell Walmart on Energizer Battery Products
4 that they had to match or exceed Walmart’s prices. If Energizer’s direct purchasers
5 nevertheless charged lower prices than Walmart, Energizer would further inflate the
6 wholesale prices it charged to those direct purchasers until it was no longer economically
7 feasible for them to compete with Walmart.

8 6. These two components – Energizer’s agreement with Walmart (1) to inflate
9 its wholesale prices for its Battery Products to direct purchasers other than Walmart and
10 (2) to prevent its wholesale customers from charging retail prices below Walmart’s –
11 formed the Scheme.

12 7. The Scheme was facilitated by Energizer’s power in the market for
13 disposable batteries – over 50% – and its duopolistic power with Duracell – together they
14 control about 85% of the market. In a duopolistic market, a price increase by the market
15 actor with the greatest market share – here, Energizer – will often be met by a comparable
16 price increase by the market actor with the next greatest market share – here, Duracell –
17 particularly if a dominant retailer – Walmart – limits Duracell’s ability to gain market
18 share by competing on price.

19 8. The Scheme artificially inflated Energizer’s and Duracell’s prices. Walmart
20 is a huge, national retail outlet for Battery Products. To support the Scheme, Walmart
21 offered Duracell Battery Products at prices that would not undermine its inflated prices
22 for Energizer Battery Products. That deprived Duracell of a crucial opportunity to
23 compete with Energizer for market share based on price. The Scheme thus decreased
24 Duracell’s incentive to compete with Energizer on price and increased Duracell’s
25 incentive to match Energizer’s inflated prices. The result was that Energizer’s and
26 Duracell’s wholesale prices were higher than they would have been without the Scheme.

27 9. The Scheme benefited Energizer, enabling it to charge higher prices than it
28 otherwise would have.

1 22. Safety concerns and regulations impose additional barriers to entry.
2 Disposable batteries are manufactured using metals such as mercury, lead, cadmium, and
3 nickel. Lead and mercury are hazardous materials, and waste from battery
4 manufacturing creates costly environmental contamination problems.

5 23. Advertising is another barrier to entry for new entrants into established
6 markets like the disposable battery market. Energizer has invested hundreds of millions
7 of dollars in advertising to build its brand. Energizer spends an estimated \$70-80 million
8 a year in advertising, principally to distinguish itself from Duracell, its chief rival.
9 Energizer and Duracell together account for about 85% percent of total U.S. disposable
10 battery sales, and Energizer by itself accounts for over 50% of those sales. Each company
11 has market power.

12 24. The recent market outlook for disposable batteries has been bleak. The
13 conventional wisdom is that with advances in technology, and the rising popularity of
14 smartphones, videogames, and online games, alkaline battery use will increasingly be
15 limited to flashlights, smoke alarms, and a few other low-tech applications.

16 25. High technology and advanced circuitry also increasingly produce smaller
17 consumer devices that are powered with rechargeable or renewable power sources,
18 further limiting disposable battery use.

19 26. Consumer demand for disposable batteries has also been dampened by
20 environmental concerns. Many consumers prefer rechargeable batteries to protect the
21 environment, and scientific studies have concluded that the use of rechargeable batteries
22 should be encouraged for high consumption devices such as cameras, flashlights, and
23 electronic toys.

24 27. Disposable batteries thus face a declining market outlook and have long
25 been predicted to lose sales to renewable batteries or to be displaced by new technology
26 in devices that do not require batteries to operate. According to a news report, "These
27 trends—lower power consumption, better and cheaper rechargeables, new power
28 sources—are squeezing what used to be a lucrative market. Remote controls for

1 televisions, for example, used to be powered by batteries. Now they can be an app on a
2 mobile phone.”

3 **B. Walmart’s dominance in the retail market makes it a critical relationship**
4 **for battery suppliers.**

5 28. At the retail level for Battery Products, there is a single dominant firm,
6 Walmart.

7 29. Walmart is the only retailer that is large enough for Energizer to reference
8 in its annual SEC filings: “Although a large percentage of our sales are attributable to a
9 relatively small number of retail customers, in fiscal year 2020, only Wal-Mart Stores, Inc.
10 accounted for ten percent or more (14.1%) of the Company’s annual sales.”

11 30. Walmart has historically been a large part of Energizer’s revenues.

12 31. In 2013, Energizer lost an exclusive contract with Walmart to supply
13 batteries to Walmart’s discount chain, Sam’s Club.

14 32. The effect that losing the contract had on Energizer’s sales illustrates
15 Walmart’s dominance as a retailer and its importance to Energizer as a client.

16 33. As the below table illustrates, the year before losing the contract, Walmart
17 purchases constituted 20% of Energizer’s overall sales. Just one year later, that percentage
18 dropped to 13.3%, and the next, to 8.5%.

Fiscal Year	% Sales to Walmart
2012	20.0
2013	13.3
2014	8.5
2015	10.0
2016	10.4
2017	12.1
2018	11.5
2019	13.8
2020	14.1

2021

13.7

34. The drops in sales to Walmart had corresponding effects on Energizer's bottom line: Energizer missed earnings and profit estimates in 2014 and 2015, and its share price suffered.

C. Energizer and Walmart agree to the Scheme.

35. As early as January 2018, Walmart and Energizer again agreed to a deal that would give Energizer products preferential treatment in Walmart stores, and the downward trend reversed. As illustrated above, after going as low as 8.5%, Energizer's Walmart sales rebounded to around 14% of all Energizer sales starting in 2019.

36. Walmart and Energizer's agreement extended beyond Walmart giving Energizer Battery Products preferential treatment at its stores. Under pressure from Walmart, Energizer agreed to the Scheme, which shielded Walmart from price competition from other retail sellers of Energizer Battery Products and allowed both Walmart and Energizer to charge supracompetitive prices.

37. The Scheme had two components. First, Energizer agreed with Walmart to artificially inflate the wholesale prices it charged to Walmart's competitors for Energizer Battery Products to prevent them from undercutting Walmart's retail prices. Second, Energizer agreed with Walmart to monitor Walmart's competitors to ensure that they did not charge lower retail prices for Energizer Battery Products than Walmart—and to discipline those that did.

38. Energizer created a group called Project Atlas to fulfill its obligations to Walmart under the agreement. Project Atlas policed Energizer's customers' retail prices and raised wholesale prices as necessary to force Energizer's customers to maintain retail prices that did not undercut Walmart's.

D. Energizer and Walmart implement the Scheme.

39. The Scheme has been in effect from as early as January 2018 and continues to the present (the "Relevant Time Period").

1 40. By April 2018, Energizer had increased its prices by over 8% from the prior
2 year.

3 41. That same year, at Walmart’s behest, Energizer’s Project Atlas policed
4 Walmart’s competitors’ retail prices for Energizer Battery Products and disciplined
5 Portable Power and other retailers for underselling Walmart, in furtherance of the
6 Scheme.

7 42. For example, in November 2018, Project Atlas disciplined Portable Power
8 for its pricing of Energizer headlamps, a Battery Product sold by Walmart and, at that
9 time, Portable Power.

10 43. Acting on complaints from Walmart, Energizer raised its wholesale prices
11 for headlamps to Portable Power to force it to raise its retail prices to match or exceed
12 Walmart’s.

13 44. As explained in an internal email sent by Energizer manager Jeffrey Stoll,
14 Energizer had received complaints from Walmart regarding “disruptive pricing on
15 Amazon & Wal-Mart.com on headlights and specialty batteries.”¹ Walmart asked
16 Energizer what it was doing to “resolve” the issue.

17 45. Mr. Stoll mentioned Portable Power by name as a driver of the “disruptive
18 pricing.”

19 46. Mr. Stoll’s email highlighted Portable Power as selling at “disruptive”
20 prices—i.e., lower and more competitive prices—and noted the link between reining in
21 Portable Power’s retail pricing and Energizer’s efforts to maintain high prices across retail
22 distribution channels.

23 47. Energizer recognized the disruption that competitors such as Portable
24 Power would have on Walmart’s business and sales of Energizer Battery Products
25 generally. Raising prices to Portable Power and its other direct purchasers would have
26 the effect of diminishing competition in the retail market—to the benefit of Walmart.

27 _____
28 ¹ Wal-Mart.com, like Amazon, is a marketplace that allows third-party retailers to sell
products.

1 Energizer understood that raising its wholesale prices to Portable Power and members of
2 the Classes would increase retail prices.

3 48. Energizer explained that, with headlamps as well as other Battery Products:

4 [W]e are selling to Portable Power, Inc. at [wholesale] pricing that would
5 allow them to be disruptive on e-commerce. Anything we can do to
6 influence pricing with Portable Power will be key to reducing the
7 disruption in the [North American] market.

8 49. To bring Portable Power's retail pricing up to the level of Walmart's,
9 Energizer raised its wholesale prices to Portable Power for headlamps by about 50-85%
10 for certain models, as illustrated by the below spreadsheet Energizer sent to Portable
11 Power in November 2018:

HDA32E.1 NA VISION HEADLIGHT	98165982	E300276500	10/01/18	09/30/19	\$5.00	\$7.68	\$2.68	Increase
HDB32E.1 NA VISION HD HEADLIGHT	98165982	E300276800	10/01/18	09/30/19	\$6.00	\$9.84	\$3.84	Increase
HDBIN32E.1 NA VISION HD IND HEADLGT	98165982	E300423100	10/01/18	09/30/19	\$6.00	\$9.84	\$3.84	Increase
HDC32E.1 NA VISION HD+ HEADLIGHT	98165982	E300277100	10/01/18	09/30/19	\$7.00	\$13.02	\$6.02	Increase
HDD32E.1 NA VISION HD+ FOCUS HEADLIG	98165982	E300277400	10/01/18	09/30/19	\$8.00	\$15.02	\$7.02	Increase
HDDIN32E.1 VISION HD+FOCUS IND HDL	98165982	E300423200	10/01/18	09/30/19	\$8.00	\$15.02	\$7.02	Increase

15 50. At that time, November 2018, Energizer's Stephanie Rice, a sales
16 representative that worked with Portable Power, told Portable Power's CEO that
17 Energizer was raising Portable Power's prices to align them with Energizer pricing
18 policy. Energizer did not tell Portable Power that the price increases Energizer was
19 imposing were because of the Scheme. (See below, § IX.B., for allegations of fraudulent
20 concealment.)

21 51. This policy was new to Portable Power, which had purchased Battery
22 Products from Energizer for years, and represented a change in Energizer's pricing
23 policy.

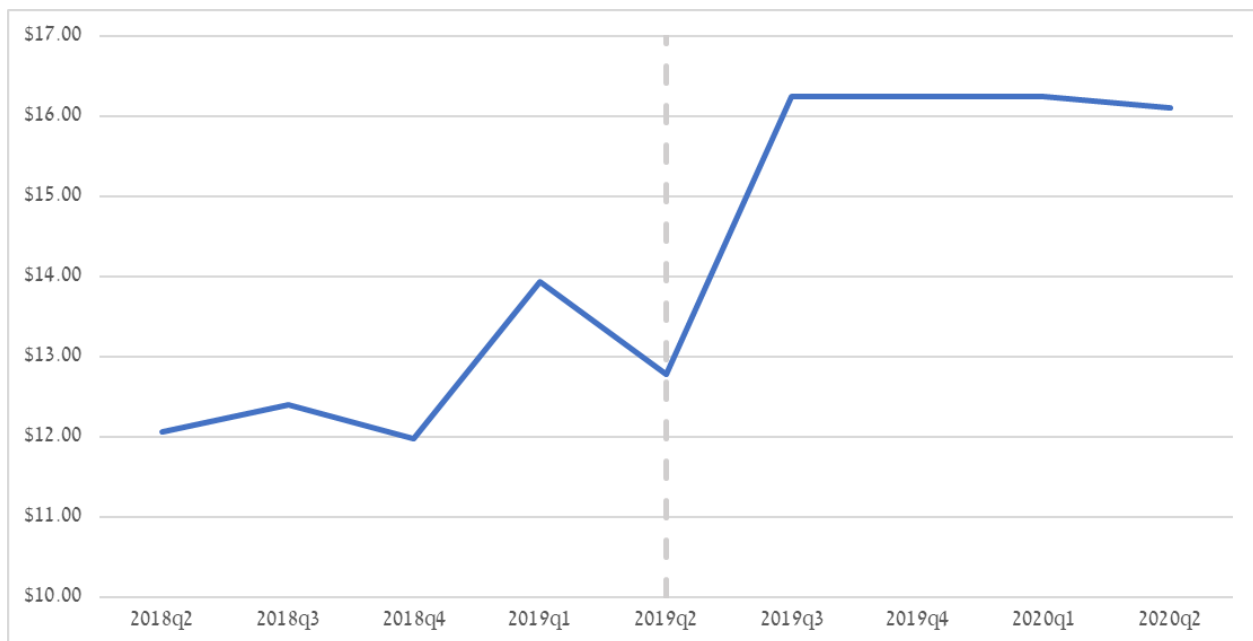
24 52. Energizer also began rolling out widespread wholesale price increases for
25 direct purchasers other than Walmart in accordance with the Scheme.

26 53. For example, in the second quarter of 2019, Energizer announced an 8%
27 price increase for its Energizer® Max Alkaline Batteries and Energizer® Ultimate Lithium
28 Batteries.

1 54. This announced price increase enabled Walmart to increase its prices for
 2 these batteries by an even greater margin: nearly 20% in the third quarter of 2019, and by
 3 nearly 40% by the first quarter of 2020.

4 55. For example, in May 2019, the month before the price increase was
 5 announced, Walmart priced a 24-pack of Energizer Max Alkaline AAA batteries at \$12.78.
 6 By July 2019, just two months later, Walmart had raised the price to \$16.24, a 27-percent
 7 increase. This price change was non-transitory; the average price of this product in the 12
 8 months before the wholesale price increase was \$12.71, and the average price in the 12
 9 months after the wholesale price increase was \$16.18. Figure 1 shows the quarterly retail
 10 prices.

11 FIGURE 1: ENERGIZER MAX ALKALINE AAA 24 PACK WALMART RETAIL PRICE



23
 24 56. Energizer continued to impose similar price hikes at regular intervals in
 25 2020 and 2021.

26 57. In September and October 2020, Energizer raised prices across its product
 27 lines by at least 10%; in April 2021, Energizer raised prices on its MAX line of batteries by
 28

1 at least 10%; and in June 2021, Energizer raised prices across its household battery
2 portfolio by 11%.

3 58. Energizer implemented its price increases because of its agreement with
4 Walmart and at Walmart's behest.

5 59. Energizer understood that raising its wholesale prices to its direct
6 customers would, in turn, increase the retail prices its direct customers charged at retail.
7 These price increases were intended to force retailers competing with Walmart in selling
8 Energizer Battery Products to increase their retail prices up to or above Walmart's.

9 60. In January 2021, Energizer again targeted Portable Power for underselling
10 Walmart.

11 61. Ms. Rice forwarded an email from Energizer's Project Atlas team to
12 Portable Power's CEO that informed him that Portable Power was among the top-ten
13 Amazon sellers "in violation" of Energizer's "pricing policies" — *i.e.*, that Portable
14 Power's retail prices were below the price floor Energizer had set with Walmart — for
15 December 2020.

16 62. The email included the following chart reflecting the "top ten" violators on
17 Amazon (which refers to Portable Power under the name "HB Wholesale"):

18 Top Amazon Sellers in Violation for December 2020

#	SELLER	STATUS	VIOLATIONS	AVG %	ALEXA	RATINGS	LAST ACTION	DATE
1	amazon.com	Authorized [amazoz	274	-13.6%	10	N/A	New	---
2	bestdealsupply.com	Unauthorized Indire	127	-19.0%	NA	N/A	Escalated Enforcement - New	08/01/20
3	MYBATTERYSUPPLIER [Amazon US]	Unauthorized Indire	109	-11.6%	NA	379910	Escalated Enforcement - New	08/01/20
4	National Deals [Amazon US]	Unauthorized Indire	68	-22.1%	NA	85184	Letter Sent - New	12/15/20
5	Another Day in ParadisePCB [Amazon US]	Unauthorized Indire	34	-12.8%	NA	2294	New	---
6	Tzohar Inc [Amazon US]	Unauthorized Indire	31	-15.9%	NA	1257	Letter Sent - New	11/20/20
7	Quiverr [Amazon US]	Authorized	17	-24.6%	NA	85647	New	---
8	JustCalculators [Amazon US]	Unauthorized Indire	14	-39.8%	NA	46232	Letter Sent - New	10/20/20
9	718 Sold It [Amazon US]	Unauthorized Indire	14	-7.6%	NA	6347	Letter Sent - New	12/14/20
10	HB Wholesale [Amazon US]	Unauthorized Direc	10	-26.5%	NA	48175	New	---

1 63. The chart shows that Energizer’s Project Atlas had a system in place to
2 monitor and discipline its direct-purchaser retailers: it sent letters, escalated enforcement,
3 and as Portable Power’s experience illustrates, subjected noncompliant sellers to repeated
4 price increases.

5 64. An internal email communication from Energizer’s Colby Mowery, a
6 member of Energizer’s trade and price strategy team, to Energizer manager Brad
7 Sellenriek attaching the top-ten list confirmed that Energizer’s Project Atlas had
8 contacted Portable Power because of Energizer’s agreement with Walmart.

9 65. Mr. Sellenriek forwarded the message to Ms. Rice and clarified that Portable
10 Power was being asked to raise its retail prices:

11 Stephanie- Please see the latest situation on [Portable Power]. Before we
12 shut them off on these [products], let’s see if he’s willing [to] revise his
13 pricing and get him off the radar.

14 66. Following these messages in January 2021, Energizer increased various
15 wholesale prices to Portable Power for Energizer Battery Products in accordance with its
16 agreement with Walmart. Energizer also told Portable Power the minimum price it had
17 to charge – Walmart’s price – to avoid being terminated as a distributor.

18 67. Energizer repeatedly warned Portable Power that if it did not increase its
19 retail prices to match or exceed Walmart’s, it would be cut off from purchasing Battery
20 Products from Energizer.

21 68. On or about February 1, 2021, Ms. Rice warned Portable Power that,
22 because Portable Power had not raised its retail prices to match Walmart’s, Energizer
23 would stop shipping certain Energizer Battery Products to Portable Power. When
24 Portable Power’s CEO discussed Energizer’s decision with Ms. Rice later that day, she
25 admitted that Energizer had adjusted its pricing policies at Walmart’s request, telling him
26 “This is 1000% about Walmart and wanting the best price.”
27
28

69. According to Ms. Rice, Energizer inflated its wholesale prices for Energizer Battery Products to Portable Power and other wholesalers to force them to sell at or above Walmart's retail prices.

70. Later that month, Energizer again quoted wholesale prices to Portable Power that were based on Walmart's prices, this time for Ray-O-Vac hearing aid batteries. Ms. Rice again said that Energizer was requiring Portable Power to match a floor created by Walmart's price for these products. In an email message dated February 16, 2021, she offered Portable Power a wholesale price that would allow it a 20% markup if it matched Walmart's retail price: "If the items are priced to match the Walmart selling price minus 20% would that work for you?" Her email included the following chart:

Rayovac Part	Description	List	Case Qty	Matrix cost	Walmart selling price	Seller	20%	Walmart selling price minus 20%
10-16	RAYOVAC RETAIL SIZE 10 16PK		24	\$8.80	\$10.81	Walmart direct	\$2.16	\$8.65
10-24	RAYOVAC RETAIL SIZE 10 24PK		24	\$12.72	\$18.76	Walmart direct	\$3.75	\$15.01
10-48	RAYOVAC RETAIL SIZE 10 48PK		6	\$24.48	\$29.75	Local Battery	\$5.95	\$23.80
10-8	RAYOVAC RETAIL SIZE 10 8PK		24	\$4.56	\$4.99	Walmart direct	\$1.00	\$3.99
13-16	RAYOVAC RETAIL SIZE 13 16PK		24	\$7.68	\$7.49	Walmart direct	\$1.50	\$5.99
13-24	RAYOVAC RETAIL SIZE 13 24PK		24	\$10.80	\$9.79	Walmart direct	\$1.96	\$7.83
13-48	RAYOVAC RETAIL SIZE 13 48PK		6	\$18.72	\$17.99	DZEE Suppliers	\$3.60	\$14.39
13-8	RAYOVAC RETAIL SIZE 13 8PK		24	\$3.76	\$6.87	Walmart direct	\$1.37	\$5.50
312-16	RAYOVAC RETAIL SIZE 312 16PK		24	\$7.68	\$7.49	Walmart direct	\$1.50	\$5.99
312-24	RAYOVAC RETAIL SIZE 312 24PK		24	\$11.04	\$9.79	Walmart direct	\$1.96	\$7.83
312-48	RAYOVAC RETAIL SIZE 312 48PK		6	\$21.12	\$16.89	Walmart direct	\$3.38	\$13.51
312-6	RAYOVAC RETAIL SIZE 312 6PK		24	\$3.12	\$5.87	Walmart direct	\$1.17	\$4.70
312-8	RAYOVAC RETAIL SIZE 312 8PK		24	\$4.00	\$6.87	Walmart direct	\$1.37	\$5.50
13-6	Not in bid tool	\$4.86			\$5.87	Walmart direct	\$1.17	\$4.70
13-32	Not in bid tool	\$18.88			\$16.97	Walmart direct	\$3.39	\$13.58

71. Ms. Rice was offering a wholesale price to Portable Power that was 20% below Walmart's retail price so that Portable Power could have a sufficient markup if it set its retail prices at or above Walmart's retail prices.

1 **E. Market forces cannot explain Energizer’s price increases.**

2 72. Energizer’s price increases cannot be explained by other market forces. For
3 example, the price of lithium was flat or declining for the periods before and after the
4 announced price increases. The cost of the four other commodities that make up 90% of
5 the inputs to disposable batteries—steel, graphite, manganese, and zinc—also do not
6 explain Energizer’s price increases.

7 73. Increased demand does not explain Energizer’s wholesale price increases
8 either. Energizer Battery Product prices, like disposable battery product prices generally,
9 have been increasing in the last four or five years despite a *reduction* in demand because
10 of competition from disruptive technologies, such as rechargeable batteries.

11 74. On April 17, 2018, the *Wall Street Journal* reported that price increases at
12 both Energizer and Duracell—together controlling about 85% of the market for Alkaline
13 batteries—were at odds with competitive market forces: “Batteries on average cost 8.2%
14 more than a year ago, while prices in the overall household-care segment rose only 1.8%,
15 according to Nielsen. At a time when prices are stagnating on everything from toilet
16 paper to diapers, such pricing power for a product that is increasingly obsolete has
17 confounded shoppers.”

18 75. Nor can the price increases be explained by general inflation. Inflation was
19 under 2% when Energizer announced its 2019 and 2020 price increases, 2.6% in March
20 2021 when Energizer announced its 10% price increase, and 5% in May 2021 when it
21 announced its 11% price increase.

22 **F. The scheme benefited both Walmart and Energizer to the detriment of**
23 **competition in the wholesale and retail markets for Battery Products.**

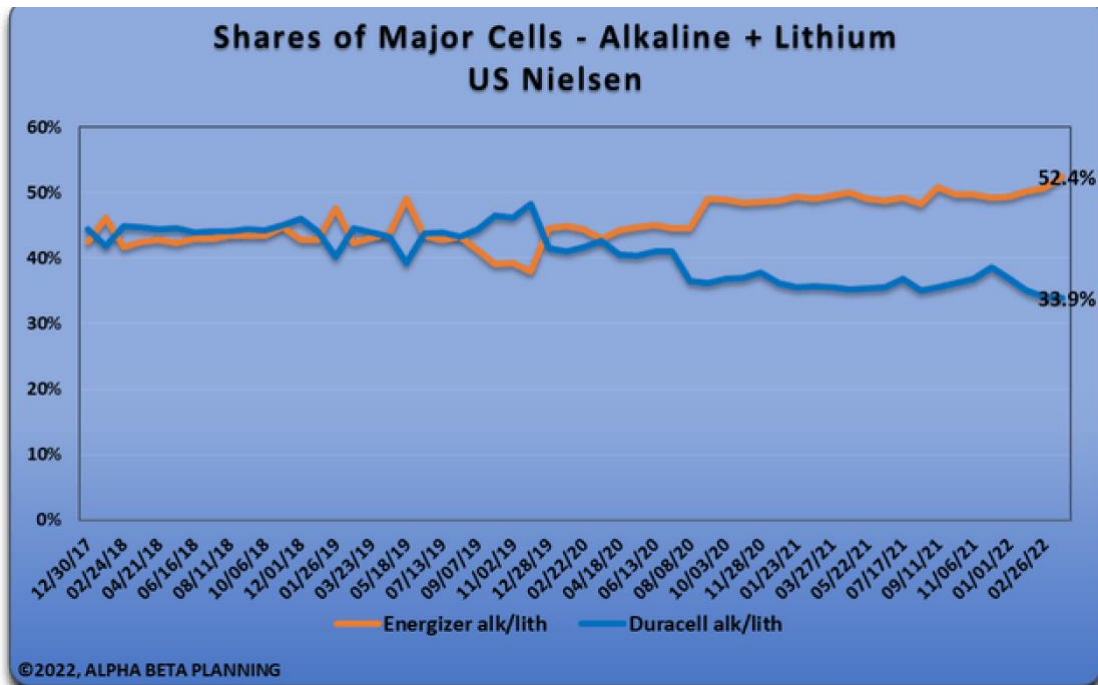
24 76. The Scheme benefited both Walmart and Energizer. First, Energizer agreed
25 to inflate its wholesale prices to Walmart’s competitors. That enabled Energizer to enjoy
26 inflated prices. It also enabled Walmart to artificially inflate its retail prices for Energizer
27 Battery Products without being undercut by other retail sellers of Energizer Battery
28 Products.

1 77. Second, Energizer agreed to prevent its direct purchasers from
2 undercutting Walmart’s retail prices. Energizer further inflated its prices to retailers, like
3 Portable Power, that chose to compete on price, ultimately driving them out of the market
4 if they did not comply. That enabled Walmart to artificially inflate its prices by an
5 additional increment.

6 78. The greatest potential threat to the Scheme was Duracell. It could have
7 attempted to steal market share from Energizer through pricing. But Walmart deprived
8 Duracell of the single largest opportunity to compete: Walmart stores. Walmart protected
9 its own inflated prices for Energizer Battery Products by charging similarly inflated prices
10 for Duracell Battery Products. That benefited Walmart. It also protected Energizer from
11 its greatest competitive threat. With Walmart stores unavailable for price competition,
12 Duracell had incentive to charge higher prices to its direct purchasers than it would have
13 charged in the absence of the Scheme.

14 79. In this way, the Scheme facilitated inflated duopolistic pricing and vice-
15 versa. On one hand, the anticompetitive agreement supported higher duopolistic prices
16 than Energizer and Duracell would have otherwise charged. The Scheme distorted
17 Duracell’s incentives, making it less attractive for Duracell to compete on price and more
18 attractive to match Energizer’s prices. On the other hand, the duopolistic Battery Products
19 market was particularly susceptible to the Scheme. Conspiracies to artificially inflate
20 prices are more likely to succeed and more stable in markets with small numbers of
21 dominant market players.

22 80. The graph below shows that Duracell has not, in fact, stolen market share
23 in response to the Scheme:
24
25
26
27
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14 **G. The Scheme caused and continues to cause antitrust injury to direct**
15 **purchasers from Energizer and Walmart.**

16 81. The Scheme caused antitrust injury to both companies' direct purchasers in
17 the form of higher prices.

18 82. Energizer's policing of its direct-purchaser retailers' prices pursuant its
19 agreement with Walmart had a market-wide effect of raising retail prices for Battery
20 Products.

21 83. Energizer's policing also enabled Walmart to inflate its retail prices for
22 Battery Products higher than they otherwise would have been, protecting Walmart from
23 competition on price from other retailer sellers of Battery Products.

24 84. Plaintiff Portable Power and other direct purchasers from Energizer paid
25 higher prices at wholesale for Energizer Battery Products than they otherwise would
26 have, forcing them to charge higher prices at retail. That allowed Walmart to raise the
27 prices it charged at retail. Then, Energizer's policing of its customers' retail prices allowed
28

1 Walmart to charge even higher prices for Energizer and Duracell Battery Products than
2 it would have without the Scheme.

3 VI. MARKET POWER AND MARKET DEFINITION

4 85. The relevant product market consists of the market for disposable battery
5 products. There are no reasonable substitutes for disposable batteries for the vast
6 majority of uses for which they are purchased. Rechargeable batteries are not reasonable
7 substitutes for disposable batteries because they are much more expensive and do not
8 hold a charge as long. This makes them an impractical choice for the types of applications
9 for which disposable batteries are usually used, particularly applications that require low
10 power output or infrequent power draws for a longer period of time than rechargeable
11 batteries, such as for smoke alarms, children’s toys, and remote controls.

12 86. The relevant geographic market consists of the United States, and its
13 territories, possessions, and the Commonwealth of Puerto Rico (in conjunction with the
14 relevant product market above, the “Relevant Market”).

15 87. Energizer has substantial market share within the Relevant Market,
16 controlling more than 50% of the market. Most of the rest of the market belongs to
17 Duracell. Together with Duracell, Energizer has duopoly power, as explained above.

18 88. Energizer’s power in the market for disposable battery products also gives
19 it power over price—and hence market power—over disposable-battery dominated
20 lighting products, such as headlamps and flashlights, because disposable batteries are
21 their largest cost component.

22 89. Direct evidence establishes Defendants’ combined power in the Relevant
23 Market and over all Battery Products. That direct evidence includes Defendants’ ability
24 to profitably and sustainably inflate prices above competitive levels. It also includes: (1)
25 Energizer’s numerous large price increases since January 2018 that it implemented under
26 its agreement with Walmart and that cannot be explained based on competitive forces;
27 and (2) the decrease in the number of retail sellers that purchase Battery Products directly
28

1 from Energizer even though the retail prices for those Products are inflated above
2 competitive levels.

3 90. Defendants' conduct had a significant impact on prices for Energizer and
4 Duracell Battery Products, and has inflated Energizer's, Duracell's, and Walmart's prices
5 above competitive levels and driven distributors off the market. Reducing competition
6 from retail sellers reduces price competition at the retail level.

7 91. As shown by Energizer's significant price inflation alleged herein, inter-
8 brand competition did not restrain Energizer from inflating its prices. On the contrary,
9 Energizer's agreement with Walmart reduced price competition between Energizer and
10 Duracell by encouraging Duracell to follow Energizer's price increases and reducing
11 Duracell's incentive to compete with Energizer on wholesale pricing. Walmart's
12 agreement with Energizer made it easier for Duracell to observe Energizer's price
13 changes and prevented Duracell from competing with Energizer for market share by
14 lowering its prices to Walmart, as Walmart would not sell Duracell Battery Products at
15 prices that would undermine the effects of the Scheme.

16 92. During the Relevant Time Period, Energizer had market power in the
17 wholesale market for Battery Products because Energizer had the power to profitably
18 exclude competition and to inflate and maintain the prices for those products at
19 supracompetitive levels.

20 93. In January 2018, Energizer had around 40% of the U.S. market share for
21 disposable batteries. Its market share has since grown to above 50%. Energizer's market
22 power is enhanced by its agreement with the largest retailer in the United States,
23 Walmart.

24 94. The fact that Energizer was able to profitably inflate the prices of Energizer
25 Battery Products shows that there are no sufficiently reasonable substitutes, and therefore
26 that disposable battery products are a relevant market.

27 95. Walmart has a dominant position with respect to both other retail outlets
28 and manufacturers.

1 **VII. ANTICOMPETITIVE EFFECTS**

2 96. The Scheme caused Portable Power and other Energizer direct purchasers
3 to pay inflated wholesale prices for Energizer Battery Products, impairing their ability to
4 compete effectively with Walmart in the retail market.

5 97. The Scheme also enabled Walmart to charge higher prices for Energizer and
6 Duracell Battery Products to its direct purchasers than it would have charged without the
7 Scheme.

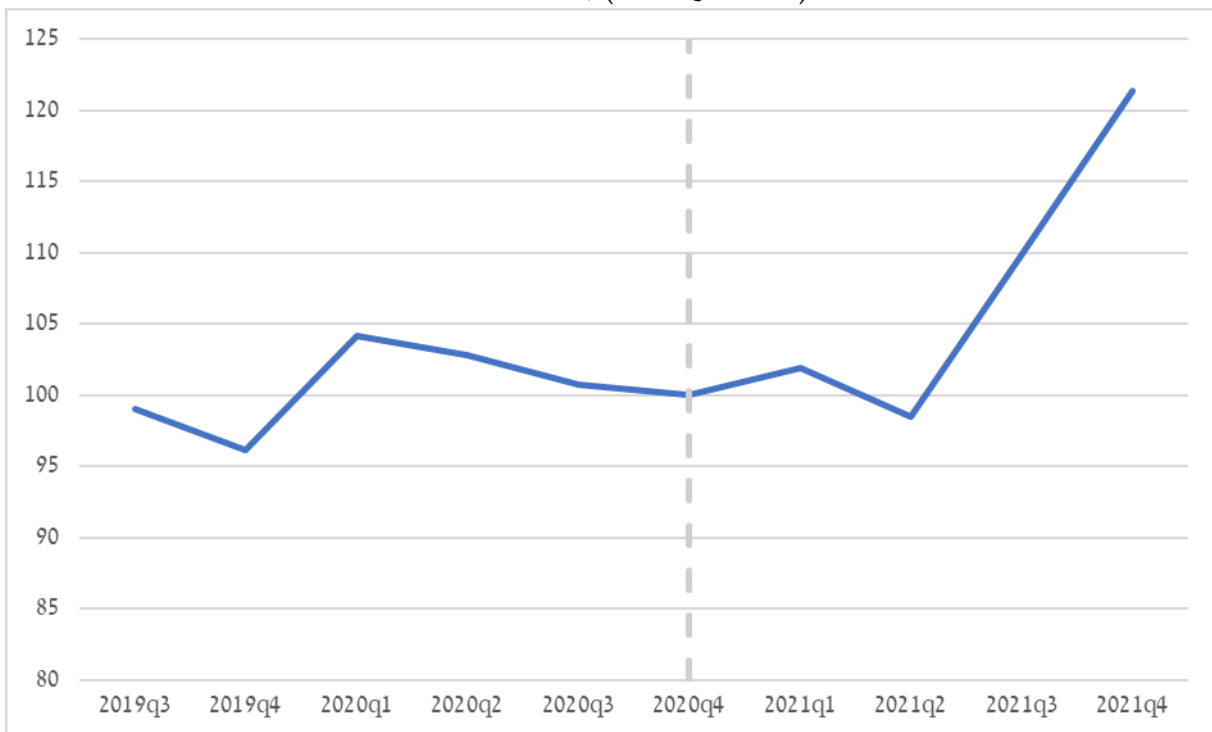
8 98. Defendants' Scheme increased Energizer's market power by reducing
9 competition between Energizer and Duracell, augmenting Duracell's incentive to match
10 Energizer's price increases, and reducing the risk that Energizer would lose market share
11 if it inflated its prices above competitive levels.

12 99. The Scheme enabled Energizer to implement a series of anticompetitive
13 wholesale price increases. The price increases started in 2018 and accelerated in 2020 and
14 2021. The wholesale prices Energizer charged direct purchasers increased by more than
15 30% since 2018, and the number of retail sellers of Energizer Battery Products in the
16 market decreased during that time.

17 100. The price increases identified above cannot be adequately explained by
18 general inflation in the economy or other competitive market forces.

19 101. The Scheme also reduced competition on the retail level by impairing
20 retailers, such as Portable Power, from gaining market share by offering retail prices for
21 Energizer Battery Products lower than Walmart's. As a result, the Scheme increased
22 Walmart's market power. Walmart used that market power to inflate prices above
23 competitive levels for Energizer and Duracell Battery Products. For example, Walmart
24 inflated and maintained its retail prices above competitive levels for alkaline and lithium
25 disposable batteries after Energizer inflated its wholesale price in June and July 2021, as
26 indicated in Figure 2:
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FIGURE 2: ENERGIZER ALKALINE AND LITHIUM PRODUCTS INDEXED WALMART RETAIL PRICE, (2020Q4 = 100)



VIII. STATUTES OF LIMITATIONS DO NOT BAR PLAINTIFF'S CLAIMS

A. Continuing Violation

102. During the Relevant Time Period, Defendants' Scheme was a continuing violation in which Defendants repeatedly invaded Plaintiff's and proposed Class members' interests by taking overt acts in furtherance of the Scheme.

103. Throughout the Relevant Time Period, Defendants discussed the Scheme, adjusted it to match new Walmart prices, agreed to new wholesale price increases, and repeatedly enforced their agreement against retailers who attempted to undercut Walmart's retail prices for Energizer Battery Products.

104. Throughout the Relevant Time Period, Defendants' Scheme repeatedly injured Plaintiff and proposed Class members by causing them to pay overcharges each time they purchased Energizer Battery Products.

1 **B. Fraudulent Concealment**

2 105. The statute of limitations is tolled because Defendants fraudulently
3 concealed their Scheme.

4 106. Defendants actively concealed their Scheme by having Energizer offer
5 pretextual justifications to Walmart’s competitors when it raised their wholesale prices
6 and forced them to raise their retail prices; in reality, Energizer was enforcing the terms
7 of the Scheme.

8 107. One pretext Energizer used was that retailers selling at low prices were
9 violating Energizer’s pricing policies, including a “Minimum Advertised Price” or
10 “MAP” policy.

11 108. A MAP policy is a unilateral policy a supplier enacts that prohibits retailers
12 from advertising the supplier’s products for sale below a specified, or minimum-
13 advertised, price. Retailers that violate the MAP risk being cut off from making further
14 purchases of the supplier’s products.

15 109. As early as July 2019, Energizer’s Stephanie Rice told retailer Portable
16 Power’s CEO that Energizer was enforcing a MAP policy and taking actions to cut off
17 retailers that violated that policy.

18 110. But in September 2020, Portable Power’s CEO received an internal
19 Energizer email chain that revealed that Energizer did not actually have a MAP policy.
20 In the email chain, an Energizer senior manager told an Energizer sales manager to
21 enforce Energizer’s MAP policy with Portable Power. The sales manager responded that
22 it had been difficult to implement the MAP policy with other customers in the past,
23 because Energizer did not consistently enforce any MAP policy. The senior manager then
24 apologized for potentially being misleading and acknowledged that Energizer did not
25 really have a formal MAP policy in place.

26 111. Later, in a phone conversation on or about February 1, 2021, Energizer’s
27 Stephanie Rice finally revealed to Portable Power’s CEO that Energizer’s pricing policies
28 were not about a MAP policy or any other pretext, but were “1000% about Walmart,” and

1 that Energizer’s Project Atlas was driving Energizer’s wholesale prices and policing
2 Walmart’s competitors’ prices in accordance with the Scheme.

3 112. Plaintiffs did not have actual or constructive knowledge of the facts
4 constituting their claim for relief before that February 1, 2021 phone conversation, and
5 did not discover, and could not have discovered through the exercise of reasonable
6 diligence, the existence of the Scheme until that time.

7 **IX. CLASS ACTION ALLEGATIONS**

8 113. Plaintiff Portable Power brings this action as a class action pursuant to Fed.
9 R. Civ. P. 23 and seeks certification of the following Classes:

10 114. California Class:

11 *All persons and entities that purchased Energizer Battery Products directly from*
12 *Energizer in California from January 1, 2018 until the anticompetitive effects of*
13 *Defendants’ challenged conduct cease.*

14 115. National Class:

15 *All persons and entities that purchased Energizer Battery Products directly from*
16 *Energizer in the United States from January 1, 2018 until the anticompetitive*
17 *effects of Defendants’ challenged conduct cease.*

18 116. Excluded from the Classes are Defendants, their officers and directors, and
19 members of their immediate families or their legal representatives, heirs, successors, or
20 assigns and any entity in which Defendants have or had a controlling interest. Also
21 excluded is the judge presiding over this matter, the judge’s staff members, and the
22 judge’s and the judge’s staff members’ immediate families and their legal representatives,
23 heirs, successors, or assigns.

24 117. **Numerosity.** The members of the Classes are so numerous that joinder of
25 all members is impracticable. After a reasonable opportunity for further investigation or
26 discovery, the evidence is likely to show that the Class members number in the hundreds
27 or thousands.

1 118. **Typicality.** The claims of Portable Power are typical of the claims of
2 members of the Classes, entities and persons that are similarly affected by Defendants'
3 wrongful conduct in violation of the laws complained of herein. Portable Power
4 purchased Battery Products directly from Energizer during the Relevant Time Period and
5 was injured thereby. Plaintiff's injuries are typical of injuries of the members of the
6 Classes, all of which also purchased Energizer Battery Products directly from Energizer
7 during the Relevant Time Period.

8 119. The interests of Plaintiff Portable Power do not conflict with those of other
9 members of the Classes.

10 120. **Commonality.** Questions of law and fact common to the members of the
11 proposed Classes include:

- 12 a. Whether Defendants agreed to the Scheme;
- 13 b. The nature, scope, and extent of the Scheme;
- 14 c. Whether retail competition for sales of Energizer and Duracell
15 Battery Products was impaired by the Scheme;
- 16 d. Whether the Scheme violates the Sherman Act or the Cartwright Act
17 because it is per se illegal;
- 18 e. Whether the Scheme, in the alternative, is unlawful under the rule of
19 reason;
- 20 f. Whether Plaintiff Portable Power, and Class members were injured
21 by the Scheme;
- 22 g. The appropriate measure of classwide damages for each Class; and
- 23 h. Whether the Court should grant injunctive relief to prevent the
24 Scheme from recurring, and, if so, what injunctive relief is
25 appropriate.

26 121. **Predominance.** The above common issues predominate over any issues
27 affecting only individual Class members.

1 128. As Energizer’s annual S.E.C. filings acknowledge, one factor that affects
2 Energizer’s ability to compete effectively is the risk that Energizer might “lose market
3 share to certain retailers . . . which may offer ‘private label’ brands that are typically sold
4 at lower prices and compete with the Company’s products in certain categories.”²
5 Similarly, Energizer acknowledges that “a move by one or more of our large customers
6 to sell significant quantities of private label products, which we do not produce on their
7 behalf and which *directly compete with our products*, could have a material adverse effect
8 on our business.”³

9 129. Walmart was one of these retailers that competed directly and horizontally
10 with Energizer by offering its own private label brand of Battery Products.

11 130. Therefore, the agreement between Energizer and Walmart to fix and inflate
12 the prices paid by direct purchasers for Energizer Battery Products was a horizontal
13 agreement between competitors.

14 131. Defendants’ conduct is unlawful under the rule of reason.

15 132. Energizer has market power in a relevant market.

16 133. The market for Battery Products is a relevant antitrust market. Disposable
17 batteries are distinguished from rechargeable batteries based on technology, and from
18 specialty batteries due to their specific use in powering household appliances, toys,
19 flashlights, and other consumer electronic products.

20 134. Energizer has power in the market for Battery Products. Disposable
21 batteries are distinct from other types of batteries because they power cheaper, smaller
22 consumer products than rechargeable batteries or other potential substitute products.
23 Disposable batteries are routinely used in inexpensive toys, key fobs, flashlights, and
24 calculators.

25 135. Rechargeable or renewable power sources are not substitutes for disposable
26 batteries because they are used in different devices and are more expensive.

27 _____
28 ² 2019 Energizer Form 10-K at 7.

³ *Id.* (emphasis added).

1 136. Energizer’s power in the market for disposable battery products translates
2 to power in the market for the lighting products it sells, as the dominant components in
3 those products are disposable batteries.

4 137. Energizer’s market power was enhanced by the Scheme in that it is an
5 agreement with the largest retail outlet in the United States, Walmart.

6 138. Walmart has market power in the “brick-and-mortar” retail market, as it is
7 the largest retailer in the United States.

8 139. Walmart used its market power to cause Energizer to agree to limit price
9 competition from Energizer’s other direct purchasers and to discourage Duracell from
10 competing with Energizer on wholesale prices.

11 140. There is no pro-competitive justification for the Scheme. For example,
12 Energizer Battery Products are not specialized products that require retailers to expend
13 resources to explain their use to consumers or to maintain a skilled sales staff that is
14 familiar with their products.

15 141. The Scheme violates the rule of reason under a “quick look” analysis
16 because its anticompetitive effects are plain and obvious.

17 142. The Scheme violates the full-blown rule of reason because the agreement
18 harms competition without providing any procompetitive benefits.

19 143. As a result of the Scheme, wholesale and retail prices for Energizer and
20 Duracell Battery Products were inflated above competitive levels in the Relevant Market.

21 144. As a result of the Scheme, Portable Power and National-Class members
22 have been injured in their businesses and property in that they have paid more for
23 Energizer Battery Products than they would have paid in the absence of the Scheme.

24 145. With respect to the claim under the Sherman Act, Portable Power and
25 National-Class members seek injunctive relief, treble damages, and attorneys’ fees and
26 costs.
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COUNT II

Violation of California's Cartwright Act

Cal. Bus. & Prof. Code §§ 16720 et seq.

(Vertical Price Fixing)

Against All Defendants on Behalf of the California Class

146. Plaintiff incorporates by reference each preceding and succeeding paragraph as though fully set forth herein.

147. The Scheme has occurred in substantial part in the State of California, Defendants all reside in the State of California, and Plaintiff Portable Power brings this claim for violation of the Cartwright Act on behalf of members of the California Class.

148. Defendants violated and continue to violate the Cartwright Act by entering into, furthering, and enforcing an unreasonable restraint of trade. More specifically, Energizer agreed with Walmart to fix, increase, inflate, or stabilize prices of Energizer Battery Products.

149. The Scheme caused Plaintiff Portable Power, and California-Class members to pay inflated prices for Energizer Battery Products on purchases in California.

150. The Scheme inflated above competitive levels the wholesale prices at which Portable Power and California-Class members purchased Energizer Battery Products directly from Energizer in California.

151. Defendants' conduct is per se unlawful under the Cartwright Act because it involves an agreement to restrain prices.

152. As a result of Defendants' violation of the Cartwright Act, Plaintiff Portable Power and California-Class members seek treble damages and the costs of suit, including reasonable attorneys' fees. *See* Cal. Bus. & Prof. Code § 16750(a).

COUNT III

Violation of California’s Unfair Competition Law

Cal. Bus. & Prof. Code §§ 17200 et seq.

Against All Defendants on Behalf of the California Classes

153. Plaintiff incorporates by reference each preceding and succeeding paragraph as though fully set forth herein.

154. Defendants violated and continue to violate California’s Unfair Competition Law, which prohibits unlawful, unfair, and fraudulent business practices.

155. Defendants’ practice of artificially inflating wholesale and retail prices of Energizer Battery Products above supra-competitive levels, including through the Scheme, constitutes an unlawful and unfair business practice.

156. Defendants’ practice is unlawful in that it violates the Sherman Act, 15 U.S.C. §§ 1 and 3, and California’s Cartwright Act, Cal. Bus. & Prof. Code §§ 16720 et seq., as alleged in Counts I and II, above.

157. Defendants’ practice is unfair for at least the following reasons:

- a. Defendants’ conduct undermines or violates the stated public policies and spirit underlying the Sherman and the Cartwright Acts;
- b. Defendants’ conduct is unethical, oppressive, unscrupulous, or substantially injurious to Plaintiff and California-Class members; and
- c. The gravity of harm to Plaintiff and California-Class members from Defendants’ practice far outweighs any legitimate utility of that conduct.

158. As a direct and proximate cause of Defendants’ conduct, including the Scheme, Plaintiff and California-Class members suffered injury in fact and have lost money or property because they paid artificially inflated, supra-competitive prices to Defendants for Energizer and Duracell Battery Products.

159. Plaintiff and California-Class members are entitled to restitution, injunctive relief, and reasonable attorneys’ fees and costs.

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