



**Law & Economics
Center**
 School of Law 3301
 Fairfax Drive, MS 1G3,
 Arlington, Virginia 22201
 Phone: 703-993-8040; Fax:
 703-993-8181
 Web: MasonLEC.org



**ANTITRUST LAW & ECONOMICS
INSTITUTE FOR JUDGES**

**IN THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

<p>RED STORM BRANDS, INC.,</p> <p style="padding-left: 100px;">Plaintiff/Counterdefendant,</p> <p style="text-align: center;">v.</p> <p>WORLDDRINK, INC.,</p> <p style="padding-left: 100px;">Defendant/Counterclaimant.</p>	<p>) Case No. 2012 AL&E INSTITUTE</p> <p>) MOCK TRIAL</p> <p>)</p> <p>) CASE BACKGROUND</p> <p>)</p> <p>) MATTER TO BE HEARD AT THE GMU</p> <p>) LAW SCHOOL ON</p> <p>)</p> <p>) Date: October 10, 2012</p> <p>)</p> <p>) Time: 9:30 a.m.</p> <p>)</p>
--	---

PARTIES

Plaintiff/Counterdefendant Red Storm Brands, Inc. (“RSB”) is a relatively small and new company that sells drink products throughout the United States.

Defendant/Counterclaimant WorldDrink, Inc. (“WorldDrink”) is a large, multinational corporation that manufactures and sells a variety of food and drink products in the United States and several other countries.

FACTUAL BACKGROUND

This trial involves an antitrust dispute between RSB and WorldDrink over their energy drink businesses. Plaintiff RSB claims that Defendant WorldDrink has unlawfully attempted to obtain a monopoly in the market for energy drinks in the United States in violation of Section 2 of the Sherman Act. In its counterclaim, WorldDrink accuses RSB of false advertising under the Lanham Act by falsely stating on its packaging that its energy drink performs as well as WorldDrink's.

“Energy drinks” are beverages labeled and marketed as “energy drinks” and/or marketed as providing increased energy levels, alertness, or stamina. Energy drinks typically contain caffeine and sugar, and often contain some combination of vitamins, herbs, and/or electrolytes. “Energy drinks,” as that term is used by the parties, does not include soft drinks, coffee drinks, or “sports drinks” such as Gatorade and Powerade.

Energy drinks have grown substantially in popularity over the last decade. They are most popular among students, professionals, and others who wish to fight off fatigue or increase productivity, and also by consumers who wish to stave off sleep while socializing (often in bars and at parties) in the late evening. Some of them are carbonated. Energy drinks are often sold at convenience stores, gas stations, bars and other retail outlets where consumers can make “spot” purchases for immediate consumption.

One of WorldDrink's best-selling products is Blue Surf Energy Drink (“Blue Surf”), a lightly carbonated energy drink containing caffeine and a blend of vitamins, sugars, and electrolytes that it claims is “scientifically proven” to increase energy levels. Blue Surf is sold throughout the United States, and can be found at many grocery and convenience stores in blue 12-ounce cans.

Blue Surf has been sold in the United States for almost twenty years and has become the leading energy drink on the market. Blue Surf is a named sponsor of several “extreme” sporting events (including surfing) and is endorsed in television advertisements by popular actors and athletes. In 2004, WorldDrink’s United States revenues from Blue Surf were approximately \$530 million and, by WorldDrink’s own market estimates, Blue Surf accounted for approximately 53% of all energy drinks sold in the United States. Another competitor, Tailslide Energy Drink (“Tailslide”), manufactured by Third Party Drink Corp., was the second-leading competitor on the market behind Blue Surf with a market share of approximately 23% in 2004. The other 24% of the market was shared by dozens of competing energy drinks.

WorldDrink sells Blue Surf wholesale to most of the largest national beverage distributors and numerous smaller distributors. Those distributors sell Blue Surf to retailers, who in turn sell it to consumers. Approximately 60% of Blue Surf sales by distributors are made to convenience stores, gas stations, gyms and health clubs, and bars. Approximately 35% of sales by distributors are made to supermarkets and grocery stores, and the other 5% are sold to other various retail outlets.

In January 2005, RSB entered the energy drink market with its own carbonated energy drink, named Red Storm Energy Drink (“Red Storm”). Red Storm is sold in distinctive red 12-ounce cans. RSB initially sold Red Storm in New England only, where RSB’s headquarters and original manufacturing facility are located. When Red Storm was first introduced, RSB used only one regional distribution company to supply New England retailers, and marketed Red Storm primarily to buyers under 25 years old. Red Storm was sold mostly on local university campuses and at New England retail locations frequented by teenagers, such as malls and convenience stores. In its first few years, Red Storm gained substantial popularity among

younger energy drink buyers, who (according to market surveys) thought that Red Storm tasted better than its competitors. RSB attributed Red Storm's popularity among younger purchasers primarily to its high sugar content and a youth-focused marketing campaign that used non-professional skateboarders and other teenagers as spokespersons. Part of Red Storm's strong sales on college campuses and elsewhere was also attributable to its becoming a popular "mixer" with vodka and other alcoholic beverages.

Red Storm's initial popularity allowed RSB to steadily grow its distribution of Red Storm, expanding south and west until Red Storm was eventually sold throughout the United States. RSB opened new bottling plants in Georgia, Colorado, and California, and succeeded in reaching agreements with a number of national and regional distributors (including several national distributors that also distributed Blue Surf). Red Storm continued to sell well among under-25-year-old consumers, and RSB continued to sell it primarily on university campuses, in malls, and in convenience stores.

By the end of 2007, three years after RSB/Red Storm entered the energy drink market, WorldDrink's market research indicated that Red Storm sales accounted for approximately 6% of all sales nationally, while Blue Surf's share had dropped to approximately 50% and Tailslide's share had fallen to 22%.

To increase sales and regain market share, in January 2008 WorldDrink introduced a new marketing program that provided distributors with free, distinctive "Blue Surf" refrigerators, designed to store, cool, and display Blue Surf cans. Distributors give the Blue Surf refrigerators to certain retailers (refrigerators are placed only at convenience stores, gas stations, gyms and health clubs, and bars that sell Blue Surf) in exchange for an agreement – mandated by WorldDrink – that the refrigerators will be stocked only with Blue Surf products, will be

prominently placed within ten feet of the checkout area, and that other competing energy drinks will not be displayed within ten feet of the Blue Surf refrigerators. The Blue Surf refrigerators are 5 feet tall, 2 feet wide, and 2 feet deep, and are decorated with the same bright blue color and distinctive markings as a Blue Surf can.

The marketing program also provides distributors with a significant discount on Blue Surf in exchange for the distributors' agreement that they will not sell or distribute any competing energy drink for a minimum of one year. The discount-exclusivity program is renewable by mutual agreement annually. WorldDrink's representatives are known to aggressively enforce these agreements, and distributors that do not participate in the program are not given any discount from the standard wholesale price. At the same time, WorldDrink distributors have been known to enforce their agreements with WorldDrink and with the retailers by telling retailers to move competing products away from Blue Surf refrigerators or risk having the refrigerators removed. This has frequently been done at the direction of WorldDrink.

WorldDrink's new marketing program was very successful. Only one year later, Blue Surf had gained more market share than it had ever had before, climbing to 63% according to WorldDrink's own December 2008 market research. WorldDrink's revenues from Blue Surf sales during 2008 increased to \$945 million. Blue Surf refrigerators are now placed at approximately 80% of all convenience stores, gas stations, gyms and health clubs, and bars that sell it.

Red Storm and other competitors began to have difficulty selling to distributors since many had entered into exclusive agreements with WorldDrink. Additionally, Red Storm had difficulty selling directly to stores because many of them, especially small gas stations and convenience stores, did not have enough refrigerator space for another competing energy drink.

By December 2008, Red Storm's national market share had fallen to 2.5% and Tailslide's had fallen to 19%.

In May, 2009, RSB reacted to Red Storm's falling market share with a new plan to increase its sales. In order to address its inability to use Blue Surf's distributors, RSB started selling to more small regional distributors that were not locked into exclusivity agreements with Blue Surf, and began hiring sales representatives on college campuses and in local communities. RSB also redesigned Red Storm's packaging. Red Storm's red cans were still of a distinctively different design than Blue Surf's, but the label of every can prominently stated in large letters, "COMPARE RED STORM TO BLUE SURF: SAME PERFORMANCE, BETTER TASTE!" Shortly after RSB implemented its new plan, Red Storm began to sell with more success in areas where RSB could access regional distributors. By December 2010, Red Storm's national market share had climbed back up to 4%, while Blue Surf's market share had fallen to 61% and Tailslide's share had fallen to 17%.

PROCEDURAL HISTORY

RSB filed this lawsuit against WorldDrink in March 2010 for Attempted Monopolization in violation of Section 2 of the Sherman Act. RSB alleged that by using its market power to induce distributors and retailers to participate in the Blue Surf refrigerator and exclusivity programs, WorldDrink is unlawfully foreclosing competition in the energy drink market.

WorldDrink counterclaimed against RSB for False Advertising under the Lanham Act. WorldDrink alleged that the claims on the Red Storm label are false, as Blue Surf not only contains a distinctively different formula from Red Storm, but also contains ingredients that have been scientifically proven to increase energy levels and that are not present in Red Storm. WorldDrink alleged that Red Storm's "Compare To" and "Same Performance" statements were

misleading and deceived consumers into believing that they were purchasing an identically effective product that simply had a different taste, taking away sales from WorldDrink in the process.

Discovery was completed in September 2011 and the parties submitted briefing on competing summary judgment motions. WorldDrink submitted evidence that not only was Red Storm's formula different from Blue Surf's, but also that Red Storm's only "energy-boosting" ingredients were caffeine and sugar. WorldDrink also submitted a scientific study showing that the electrolytes and vitamins in Blue Surf enhance performance and reduce fatigue, and that 67 percent of Blue Surf users reported more energy over a longer period of time as compared to those drinking coffee or caffeinated sodas. Other surveys showed that many customers believed that Red Storm's new label meant that Red Storm had the same ingredients as Blue Surf. In its defense, RSB submitted survey evidence showing that its customers reported a greater energy boost from Red Storm than from Blue Surf. RSB also submitted survey evidence showing that customers prefer Red Storm's taste.

This Court has not ruled on the motions for summary judgment related to WorldDrink's Lanham Act counterclaim, bifurcating that claim for later determination. WorldDrink's motion for summary judgment on RSB's antitrust claims, however, was denied in January 2012. This Court found that disputed issues of material fact existed regarding whether WorldDrink engaged in conduct that foreclosed competition in the relevant market, whether WorldDrink had a specific intent to achieve monopoly power, and whether WorldDrink had a dangerous probability of achieving monopoly power. These issues are now set for trial.

ISSUES TO BE DECIDED AT TRIAL

1. Whether WorldDrink engaged in anticompetitive conduct that foreclosed competition in the national market for energy drinks.
2. Whether World Drink had a specific intent to monopolize the market.
3. Whether WorldDrink's conduct, taken as a whole, created a dangerous probability that WorldDrink would achieve monopoly power in the national market for energy drinks.

EXHIBIT A

WORLD DRINK, INC.

MEMORANDUM

To: Jane Smith, Chief Executive Officer

From: Mark Jones, Director, Blue Surf Marketing & Sales

Date: December 15, 2007

Re: Proposed New Marketing Program for a New Year!

As you know, we have seen a recent decline in our market share. We attribute this decline primarily to aggressive marketing by our competitors, in particular Red Storm Energy Drink. Our marketing department is proud to propose a new nationwide program that will incentivize our distributors and stimulate sales. We believe that implementation of this program will help to cement Blue Surf's position as the most popular energy drink in the country.

Any new marketing program must seek to remedy the issues that we face in the market. We have identified the following issues:

1. **Competitors have diluted the market.** Thanks to the recent popularity of energy drinks in the U.S., consumers now face a dizzying array of choices when deciding what energy drink to buy. Furthermore, smaller stores simply don't have room to provide to their customers all of the various options for energy drinks. While Blue Surf enjoys a huge lead over any competitor currently on the market, that lead is being chipped away by other products. In particular, we are losing sales to consumers under 25 years old, who constitute a large portion of our overall customer base. Many of these consumers seem to prefer the taste of more sugary energy drinks such as Red Storm.
2. **Distributors are selling competing products to retailers.** Although our distribution network is the best in the country, many of our distributors have begun to carry multiple brands of energy drinks. With limited space on distributors' trucks and some distributors only carrying more popular brands to certain markets (for example, carrying only Red Storm when delivering to college campuses), it essentially works against us to allow our distributors to carry competitors' products.
3. **Blue Surf is not being stored cold at all retail locations.** Our surveys have shown that customers think that Blue Surf tastes best when consumed cold. But at convenience stores, gas stations, bars, gyms, and other locations where Blue Surf is sold in single servings for immediate consumption, we have noticed that retailers often sell numerous drinks, including dozens of brands of soft drinks, juices, bottled water, milk, and other drinks. Sometimes, these retailers lack enough refrigerator space to cool and store all the drinks they sell, and many of them place Blue Surf on shelves at room temperature (or don't carry it at all) rather than in display refrigerators.

4. **Blue Surf is not bought “on impulse” as often as it could be.** Our surveys indicate that we are missing opportunities to sell Blue Surf to impulse buyers and we are not fully taking advantage of the opportunities that we do have. We found that people who do purchase energy drinks on impulse are primarily in the 16-25 age group, and that one of the problems in the retail world seems to be that at convenience stores and gas stations, refrigerators are typically near the back of the store. Customers who enter these locations to purchase something *other* than a beverage rarely go back to this section of the store. Our research shows that most impulse purchase decisions are made while the customer is standing in line to pay or paying for his or her purchase, and taking advantage of impulse buy opportunities could increase our market share among the younger consumers of energy drinks.

Our new marketing plan takes advantage of one of our greatest assets: our distributor network. We already sell to several of the largest distributors in the country, and if we sell more Blue Surf to them, they will in turn sell more Blue Surf to retailers. A successful new marketing program must result in a win-win both for us and for them. With that in mind, we propose that we implement the following for the **2008 Blue Surf Marketing Program**:

- **Blue Surf Refrigerators:** Our marketing department has designed specialized, branded “Blue Surf” refrigerators. At five feet high, two feet wide, and two feet deep, these refrigerators can hold up to 48 cans of Blue Surf, yet are smaller and more portable than the larger display refrigerators where most retailers cool and display beverages. We have secured a deal from the manufacturer whereby each of these refrigerators will cost us \$150. Under the Marketing Program, we will supply these refrigerators for free to our distributors who, in turn, will supply them for free to “single-serving, immediate consumption” retailers (convenience stores, gas stations, gyms/health clubs, and bars). These retailers will agree that they will place the refrigerators within ten feet of the checkout counter, will use them only to store Blue Surf, and will not display competing energy drinks within ten feet of the refrigerators.
- **Exclusivity Agreements:** Provide a ten percent discount on wholesale sales of Blue Surf to distributors who agree to distribute Blue Surf exclusively. With more capacity on distributors’ trucks to carry Blue Surf, and therefore more Blue Surf entering the marketplace, these exclusivity agreements will allow us to ensure that we recoup our investment on the refrigerators to be placed at retailers.

With this new marketing program, we will see Blue Surf’s sales rise to the next level. Blue Surf will be stored and consumed cold in more stores. Impulse buys will increase. Our distributors will become focused, incentivized, and highly rewarded by pushing Blue Surf sales. Our product will be sold in stores that did not previously have room for it. And Blue Surf will be the first, last and (sometimes) only energy drink that consumers see when they visit a convenience store, gas station, gym, or bar. (Take that Red Storm!)

It is an exciting time for the future of Blue Surf. We look forward to discussing this further with you at the Year-End Marketing Meeting next week!

EXHIBIT B

Anne Brown

From: Ray Johnson [RSB]
Sent: Wednesday, April 29, 2009 4:13 PM
To: Anne Brown [RSB]
Subject: RE: Marketing and Distribution Plan

Thanks for the presentation and your summary email below. Let's put the plan into action. Considering Red Storm's ingredients, the "just like Blue Surf" thing might be a bit of a stretch, but our surveys do show that our customers prefer the taste of Red Storm and report a higher energy boost. I agree that we have to find a way to tell people that they have an option in the store. I hate those stupid Blue Surf refrigerators.

-Ray

Ray Johnson
President, CEO, and Chairman
Red Storm Brands, Inc.

From: Anne Brown [RSB]
Sent: Wednesday, April 29, 2009 9:43 AM
To: Ray Johnson [RSB]
Subject: Marketing and Distribution Plan

Ray,

As you know, we have been working on a comprehensive plan to increase sales and distribution in the face of our recent falling sales figures. Our presentation to you this afternoon will describe the plan in more detail, but I thought I'd give you a quick preview.

Distribution

Our relationships with the large, national distributors are being severed as more and more of them enter into exclusive agreements with WorldDrink to distribute Blue Surf only. This is really hurting our ability to get our product out into stores. With only a few trucks of our own (which are mostly used for special events and promotions), our ability to distribute Red Storm nationally depends on our distribution network, which is being systematically dismantled by WorldDrink's exclusivity agreements.

As part of a possible remedy to this problem, we are proposing that we focus on regional distribution by smaller local distributors who still carry multiple energy drink products. Although many regional distributors are also entering into exclusive Blue Surf distribution agreements, we are already finding traction with the distributors who visit university campuses and convenience stores in residential areas, where Red Storm is in higher demand.

Marketing

While Red Storm has become a national product, we are still not a household name like Blue Surf. Our marketing programs have traditionally been low-budget and, according to our surveys, our product is advertised more by word-of-mouth than by active marketing. If we are going to get our name out there, we need to increase our marketing efforts and focus on what makes our product better than Blue Surf: taste.

We recommend a twofold marketing initiative. First, we recommend increasing the number of sales reps that we have in our core sales areas: college campuses and retail locations near high schools. With our sales already strong in this market, we won't be starting from scratch, and with additional presence in these areas, we will be able to compound our successes.

Second, we recommend a packaging change. While our current packaging is attractive, the Red Storm name is not as well-known in the marketplace as Blue Surf. Yet our own surveys show that people think our product tastes better and gives more energy. So why not say so right on the label? We recommend the following be placed on every can of Red Storm: "COMPARE RED STORM TO BLUE SURF: SAME PERFORMANCE, BETTER TASTE!"

Again, you'll get more details on the implementation of this program at the presentation this afternoon, but this should give you a good idea of what we will discuss in case you wanted to formulate any questions ahead of time. See you then,

Anne

Anne Brown
Chief Operations Officer and VP – Sales
Red Storm Brands, Inc.