

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

BEFORE THE HONORABLE WAYNE D. BRAZIL, MAGISTRATE JUDGE

MONSTER CABLE PRODUCTS, )  
INC., )  
 )  
 PLAINTIFF, )  
 )  
 VS. )  
 )  
 MONSTER VINTAGE, )  
 )  
 DEFENDANT. )

NO. C 04-2778WDB

PAGES 1 - 22

OAKLAND, CALIFORNIA  
WEDNESDAY, DECEMBER 8, 2004

TRANSCRIPT OF PROCEEDINGS

APPEARANCES:

FOR PLAINTIFF:

LARIVIERE, GUBMAN & PAYNE LLP  
19 UPPER RAGSDALE DRIVE, SUITE 200  
MONTEREY, CALIFORNIA 93940  
BY: BRENT A. CAPEHART, ATTORNEY AT LAW

FOR DEFENDANT:

CHERNOFF, VILHAUER, MCCLUNG & STENZEL  
1600 ODS TOWER  
600 S.W. SECOND AVENUE  
PORTLAND, OREGON 97204-3157  
BY: JULIANNE ROSS DAVIS, ATTORNEY AT LAW

REPORTED BY:

RAYNEE H. MERCADO, CSR NO. 8258

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-8404**

1 WEDNESDAY, DECEMBER 8TH, 2004

2:00 P.M.

2 P R O C E E D I N G S

3 **THE COURT:** SO GOOD AFTERNOON, FOLKS. LET ME CALL  
4 THE CASE AND ASK YOU TO ANNOUNCE YOUR APPEARANCES, PLEASE.

5 THE CASE SHORT STYLED IS MONSTER CABLE PRODUCTS  
6 VERSUS MONSTER VINTAGE, CIVIL ACTION NO. 04-2778WDB.

7 STARTING WITH COUNSEL FOR CABLE PRODUCTS, PLEASE  
8 ANNOUNCE YOUR APPEARANCES FOR THE RECORD.

9 **MR. CAPEHART:** YES, SIR. MY NAME'S BRENT CAPEHART.  
10 I'M AN ATTORNEY WITH LARIVIERE, GUBMAN & PAYNE, AND WE REPRESENT  
11 MONSTER CABLE PRODUCTS.

12 **THE COURT:** OKAY. THANK YOU.

13 **MR. CAPEHART:** YES, SIR.

14 **THE COURT:** YOU CAN STAY SEATED THERE, MR. CAPEHART,  
15 BUT PLEASE PULL THE MIKE TOWARD YOURSELF SO THAT WE CAN HAVE  
16 THAT SUPPLEMENTARY DEVICE FOR BOTH HEARING AND RECORDING.

17 **MR. CAPEHART:** YES, SIR.

18 **THE COURT:** AND ON BEHALF OF MONSTER VINTAGE?

19 **MS. DAVIS:** YES, YOUR HONOR. THIS IS JULIANNE DAVIS.  
20 I REPRESENT THE DEFENDANT MONSTER VINTAGE.

21 **THE COURT:** OKAY. THANK YOU. AND YOU'RE WITH  
22 MR. ZEFF'S OFFICE?

23 **MS. DAVIS:** MR. ZEFF IS MY LOCAL COUNSEL. YES, I  
24 HAVE BEEN ADMITTED PRO HAC VICE FOR THE PURPOSES OF THIS  
25 LAWSUIT.

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-8404**

1           **THE COURT:** OKAY.

2           **MS. DAVIS:** I AM WITH CHERNOFF, VILHAUER, MCCLUNG &  
3 STENZEL IN PORTLAND, OREGON.

4           **THE COURT:** YOU'RE IN PORTLAND. OKAY.

5           OKAY. WELL, I'VE READ YOUR PAPERS, ALL OF THEM, AND  
6 I'VE ACTUALLY HAD OCCASION IN THE PAST TO CONSIDER THIS KIND OF  
7 ISSUE FAIRLY CAREFULLY. AND THE -- I UNDERSTAND, I HOPE,  
8 CLEARLY THE TEST THAT'S SUPPOSED TO BE APPLIED IN THESE SETTINGS  
9 AND UNDERSTAND AS PART OF THAT THAT THE PLAINTIFF'S CHOICE OF  
10 FORUM DESERVES SUBSTANTIAL WEIGHT IN THE ANALYSIS.

11           MR. CAPEHART, IS THERE ANYTHING THAT YOU WANTED TO  
12 ADD TO WHAT'S IN YOUR PAPERS?

13           **MR. CAPEHART:** YES, SIR, I DID.

14           AS YOU KNOW, THIS CASE WAS ORIGINALLY FILED BY THE  
15 DEFENDANT WHEN THEY WERE BEING REPRESENTED PRO SE.

16           **THE COURT:** BY THE DEFENDANT.

17           **MR. CAPEHART:** OR THE MOTION, I SHOULD SAY, WAS --  
18 THE DEFENDANT WAS PRO SE.

19           **THE COURT:** RIGHT.

20           **MR. CAPEHART:** THE -- THEY OBTAINED COUNSEL, AND THEN  
21 COUNSEL THEN FILED A REPLY. I JUST WANTED TO SUPPLEMENT SOME OF  
22 MY ARGUMENT BASED UPON THEIR REPLY.

23           **THE COURT:** OKAY. OKAY. THAT'S FAIR ENOUGH. GO  
24 AHEAD.

25           **MS. DAVIS:** EXCUSE ME. I'M HAVING A LITTLE

1 DIFFICULTY HEARING MR. CAPEHART.

2           **THE COURT:** OKAY. MR. -- YEAH, THAT'S -- HE'LL COME  
3 UP TO A DIFFERENT MIKE THAT HOPEFULLY WILL BE EASIER TO PICK UP.

4           **MS. DAVIS:** THANK YOU.

5           **THE COURT:** AND IF YOU DON'T HEAR ANY OF US, PLEASE  
6 DON'T BE BASHFUL, JUST INTERRUPT US.

7           **MS. DAVIS:** THANK YOU.

8           **THE COURT:** SO, MR. CAPEHART, GO AHEAD.

9           **MR. CAPEHART:** YES. MS. DAVIS, CAN YOU HEAR US NOW?

10          **MS. DAVIS:** YES, THANK YOU.

11          **MR. CAPEHART:** OKAY. GREAT.

12                   JUST A COUPLE OF POINTS, YOUR HONOR. THEY HAVE  
13 ARGUED AND HAVE SUPPLIED VARIOUS DOCUMENTS SUCH AS FINANCIAL  
14 CAPABILITY DOCUMENTS AND NOTES FROM PHYSICIANS AND THINGS ALONG  
15 THESE LINES. THEY STILL RAISE ISSUES AS TO WHETHER OR NOT THIS  
16 CASE IS EVEN PROPER IN OREGON.

17                   THE REASON WHY WE SAY THAT IS --

18          **THE COURT:** "PROPER" MEANING JURISDICTION, VENUE?

19          **MR. CAPEHART:** JURISDICTION OR EVEN VENUE, YOU  
20 KNOW -- BE THE PROPER OR THE BETTER PLACE FOR THE VENUE TO BE OF  
21 THIS CASE.

22          **THE COURT:** WELL, WAIT NOW. I NEED TO KNOW A LITTLE  
23 MORE PRECISELY WHAT YOU'RE TALKING ABOUT.

24          **MR. CAPEHART:** CERTAINLY.

25          **THE COURT:** ARE YOU SAYING THAT THE JURISDICTION

1 WOULD ATTACH IN PORTLAND?

2 **MR. CAPEHART:** JURISDICTION WOULD PROBABLY ATTACH,  
3 BUT WHETHER IT WOULD STILL BE THE -- WOULD ALLOW THE CASE TO BE  
4 TRANSFERRED -- TO BE THE -- TO SATISFY THE TEST FOR TRANSFER.

5 **THE COURT:** OH, OKAY. SO YOU WANT TO ADDRESS FURTHER  
6 THE 1404A --

7 **MR. CAPEHART:** YES, SIR.

8 **THE COURT:** -- RATHER THAN THE 1391 --

9 **MR. CAPEHART:** CORRECT.

10 **THE COURT:** OKAY.

11 **MR. CAPEHART:** YES, SIR. YES, SIR.

12 **THE COURT:** GO AHEAD.

13 **MR. CAPEHART:** BASICALLY THEY HAVE ARGUED THAT THEY  
14 ARE A PORTLAND, OREGON COMPANY. THE PROBLEM OR THE ISSUES I  
15 WANT TO RAISE IS THAT WE ARE UNSURE IF THAT IS EVEN THE CASE.  
16 ON THEIR OWN AFFIDAVIT FILED BY MS. WEST, SHE ATTACHES A BANK  
17 STATEMENT.

18 **THE COURT:** UM-HMM.

19 **MR. CAPEHART:** THE BANK STATEMENT LISTS THE ADDRESS  
20 OF THE BUSINESS AS CAMAS, WASHINGTON. SHE'S -- IN HER AFFIDAVIT  
21 HAS ARGUED THAT SHE'S THE SOLE OWNER OF THE PLACE BUT IT'S STILL  
22 IN CAMIS, WASHINGTON. HER WEBSITE --

23 **THE COURT:** WELL, WAIT. HER AFFIDAVIT SAYS I WORK  
24 PRIMARILY IN PORTLAND. THAT'S -- MY OFFICE IS PRIMARILY IN  
25 PORTLAND. I DO SOME WORK FROM HOME BUT MOSTLY IN PORTLAND.

1           **MR. CAPEHART:** RIGHT. AND THE SOME WORK FROM HOME,  
2 IT'S A PERSONAL -- IF IT'S A DBA, HER BANK STATEMENTS ARE BEING  
3 SENT TO HER HOME AS OPPOSED TO HER BUSINESS ADDRESS IN OREGON.  
4 THEY'RE BEING SENT TO HER HOME, THEN, IN WASHINGTON.

5           THIS IS AN ONLINE BUSINESS, AND SO EXACTLY WHERE --  
6 WHAT'S THE FACILITIES IN OREGON VERSUS WHAT IS ACTUALLY GOING ON  
7 IS THEIR PRINCIPAL PLACE IN WASHINGTON? DO THEY KEEP RECORDS IN  
8 WASHINGTON VERSUS IN THEIR OFFICE IN OREGON? WE DON'T KNOW.  
9 WE'RE -- WE'RE GETTING MIXED SIGNALS BASED ON THE EVIDENCE  
10 THAT'S COMING IN OR THE INFORMATION THAT'S COMING IN.

11           **THE COURT:** WELL, IN TERMS OF CONVENIENCE ANALYSIS, I  
12 DON'T REALLY THINK THAT MATTERS BECAUSE IT'S UNCONTRADICTED THAT  
13 CAMAS, WASHINGTON IS WITHIN 15 OR 20 MINUTES OF PORTLAND.

14           **MR. CAPEHART:** THAT IS TRUE. IT'S ALSO, THOUGH,  
15 ACROSS THE JURISDICTIONAL LINES OF THE DISTRICT OF OREGON. IT'S  
16 ACTUALLY IN WASHINGTON.

17           **THE COURT:** RIGHT.

18           **MR. CAPEHART:** SO WE'RE STILL IN A DIFFERENT -- IF WE  
19 WERE TO TRY TO DEPOSE HER OR OBTAIN DOCUMENTS THAT ARE LOCATED  
20 IN WASHINGTON, YOU KNOW, THEY COULD POTENTIALLY REFUSE BASED ON  
21 JURISDICTIONAL GROUNDS.

22           **THE COURT:** NO, THEY COULDN'T.

23           **MR. CAPEHART:** WELL --

24           **THE COURT:** I MEAN, I ASSUME, MISS DAVIS, THAT YOUR  
25 CLIENT WOULD NOT CONTEST JURISDICTION IN PORTLAND?

1           **MS. DAVIS:** ABSOLUTELY NOT, YOUR HONOR.

2           **THE COURT:** RIGHT.

3           **MS. DAVIS:** WOULD NOT CONTEST JURISDICTION.

4           **MR. CAPEHART:** OKAY. THAT ALSO RAISES THE NEXT ISSUE  
5 THAT SHE'S BASICALLY SAYING SHE'S THE SOLE OWNER AND SOLE PERSON  
6 OF THIS BUSINESS. YET WE'VE HAD EXTENSIVE DISCUSSIONS WITH A  
7 SECOND PERSON WHO ALSO IS LISTED ON THEIR WEBSITE AS A --

8           **THE COURT:** IS THAT MR. PETRUCCI OR WHATEVER?

9           **MR. CAPEHART:** MR. PETRUCCI.

10          **THE COURT:** YES.

11          **MR. CAPEHART:** AND IT SAYS IN THEIR WEBSITE -- IT HAS  
12 LETTERS -- WHEN WE FIRST CONTACTED THEM OVER A YEAR AND A HALF  
13 AGO, HE'S THE PERSON THAT RESPONDED ON BEHALF OF THE COMPANY.

14          **THE COURT:** YOU'RE TALKING ABOUT A P-E-T-R-U-C-C-I?

15          **MR. CAPEHART:** YES, SIR.

16          **MS. DAVIS:** YOU'RE PRONOUNCING IT CORRECTLY, YOUR  
17 HONOR. MY UNDERSTANDING IS THAT IT'S VICTOR PETRUCCI.

18          **THE COURT:** PETRUCCI, OKAY.

19          **MR. CAPEHART:** AND HE IS ACTUALLY -- WE DON'T KNOW  
20 WHAT HIS POSITION IS. IN THE AFFIDAVIT, IT'S FAIRLY THIN WITH  
21 RESPECT TO WHAT HE DOES. IN MS. WEST'S AFFIDAVIT, SHE GOES INTO  
22 GREAT DETAIL DISCUSSING WHAT THESE OTHER WITNESSES ARE, BUT THEN  
23 WHEN SHE TALKS ABOUT MR. PETRUCCI, IT JUST SAYS HE ASSISTS ME IN  
24 RUNNING THE BUSINESS.

25          **THE COURT:** RIGHT.

1           **MR. CAPEHART:** VERY THIN. BUT YET HE IS THE PERSON  
2 THAT FLEW DOWN FROM WASHINGTON TO CALIFORNIA TO THE BAY AREA,  
3 RENTED A TRUCK AND DROVE AROUND THE BAY AREA WITH SIGNS THAT OUR  
4 CLIENT BELIEVES HAS -- COULD POTENTIALLY DEFAME OR WE BELIEVE  
5 DOES DEFAME OUR CLIENT. AND HE'S DOING IT BEHALF OF THE  
6 COMPANY.

7           NOW, FOR HER TO SAY SHE'S THE SOLE OWNER -- HE'S  
8 ACTING AS AN AGENT. HE'S ALSO LISTED ON THE WEBSITE AS  
9 MONSTERVINTAGE.COM, KATHY WEST, VICTOR PETRUCCI, AND IT'S IN THE  
10 WEBSITE. AND THAT'S THEIR -- THAT'S WHAT THEY ARE SAYING TO THE  
11 PUBLIC.

12           SO IT'S UNCERTAIN WHAT HIS ACTUAL ROLE IS AT THIS  
13 POINT. AND HE'S ACTUALLY IN WASHINGTON AND IF HE'S NOT AN  
14 EMPLOYEE OF THE COMPANY, THEN HE CAN REFUSE. AND HE'S GOING TO  
15 BE -- HE WOULD BE A MAIN WITNESS IF ANYTHING ELSE -- YOU KNOW,  
16 OUTSIDE OF MISS WEST 'CAUSE HE'S THE ONE WHO ASSISTS WITH THE  
17 RUNNING OF THE BUSINESS.

18           **THE COURT:** HE CAN REFUSE WHAT?

19           **MR. CAPEHART:** YOU KNOW, IF WE TRIED TO SUBPOENA  
20 HIM --

21           **THE COURT:** SUBPOENA HIM FOR TRIAL.

22           **MR. CAPEHART:** -- OR DO SOMETHING FROM OREGON, WE  
23 STILL HAVE TO GO TO A DISTRICT IN WASHINGTON.

24           **THE COURT:** MISS DAVIS, WOULD YOUR CLIENT COMMIT TO  
25 PRODUCING MR. DAVIS FOR DEPOSITION AND AT TRIAL IN PORTLAND?



1           **MS. DAVIS:** YES, YOUR HONOR. WE WOULD COMMIT TO  
2 MAKING SURE THAT MR. PETRUCCI IS AVAILABLE FOR DEPOSITION AND  
3 FOR TRIAL. HE DOES HAVE NO LEGAL INTEREST IN -- IN THE  
4 BUSINESS. MS. WEST IS THE SOLE PROPRIETOR OF THAT BUSINESS, BUT  
5 MR. PETRUCCI IS MS. WEST'S BOYFRIEND, AND HE DOES HELP HER RUN  
6 THE BUSINESS, PARTICULARLY GIVEN HER PHYSICAL STATE.

7           **THE COURT:** OKAY.

8           **MR. CAPEHART:** YOUR HONOR, ADDRESSING THAT, THE -- I  
9 CAN POTENTIALLY CHALLENGE THAT AS WELL. IN OCTOBER OF THIS  
10 YEAR, MR. --

11           **THE COURT:** I'M SORRY. WHAT'S THE "THAT" THAT YOU'RE  
12 CHALLENGING?

13           **MR. CAPEHART:** OH, THE -- ABOUT THE OWNERSHIP AND  
14 THINGS ALONG THOSE LINES. EXCUSE ME, YOUR HONOR.

15           IN OCTOBER OF THIS YEAR AFTER THIS SUIT WAS FILED,  
16 MR. PETRUCCI FILED A APPLICATION FOR A FEDERAL TRADEMARK  
17 REGISTRATION, AND IN THE REGISTRATION, LISTS HIMSELF AS AN  
18 OWNER.

19           **THE COURT:** OF...?

20           **MR. CAPEHART:** AN APPLICANT/OWNER OF  
21 MONSTERVINTAGE.COM, AND THIS -- I MEAN, HE SIGNED IT. THERE'S A  
22 DECLARATION. YOU HAVE TO SIGN THAT IT'S A TRUE STATEMENT, AND  
23 HE SIGNED IT.

24           **THE COURT:** UM-HMM.

25           **MR. CAPEHART:** I MEAN, SO THERE AGAIN, WE DON'T

1 KNOW --

2 **THE COURT:** MS. DAVIS, DO YOU KNOW ANYTHING ABOUT  
3 THAT?

4 **MS. DAVIS:** I KNOW THAT HE DID FILE SOMETHING ON A  
5 PRO SE BASIS. I HAVEN'T SEEN THE APPLICATION, BUT, AGAIN, YOU  
6 HAVE TO CONSIDER THE FACT THAT THIS IS A GENTLEMAN WHO'S TRYING  
7 TO ASSIST HIS SICK GIRLFRIEND AND HE MAY HAVE FILED THE  
8 DECLARATION BEING UNCERTAIN AS TO EXACTLY WHAT IT IS HE WAS  
9 SUPPOSED TO -- COULD OR COULD NOT PUT IN THERE OR WAS OR WAS NOT  
10 SUPPOSED TO BE PUT IN THERE, BUT THAT'S AS HELPFUL AS I CAN BE  
11 ON THAT, YOUR HONOR.

12 **THE COURT:** OKAY.

13 **MR. CAPEHART:** SO, YOUR HONOR, ONE OTHER POINT IS --  
14 ONE THING WE ARE -- WE'VE BEEN CONTEMPLATING, AND WE'RE ACTUALLY  
15 IN -- PREPARED TO DO IS BASED UPON MR. PETRUCCI'S ACTIONS, WE  
16 ARE IN -- WE'RE PREPARING TO FILE AN AMENDED COMPLAINT ALLEGING  
17 SOME STATE ACTIONS OF --

18 **THE COURT:** DEFAMATION.

19 **MR. CAPEHART:** -- DEFAMATION AND RELATED TYPE OF  
20 ACTIONS HERE THAT ARE PURELY CALIFORNIA STATE LAW BASED UPON HIS  
21 ACTIONS ON BEHALF OF THE COMPANY WITH THE TRUCK DRIVING AROUND  
22 BRISBANE AND SOUTH BAY AREA.

23 **MS. DAVIS:** I DON'T SEE HOW THAT COMPLAINT CAN BE  
24 BROUGHT TOGETHER WITH THIS PARTICULAR COMPLAINT. IF THEY WANT  
25 TO SUE MR. PETRUCCI THERE IN CALIFORNIA FOR ACTIVITY HE TOOK IN

1 CALIFORNIA, AND HE ALSO -- AND MR. CAPEHART HAS MADE THE  
2 REPRESENTATION THAT MR. PETRUCCI DID IT ON BEHALF OF THE  
3 COMPANY.

4 NOW, I THINK THAT'S JUST COMPLETELY -- ON  
5 MR. CAPEHART'S POINT -- POINT OF VIEW. THERE IS NO INDICATION  
6 THAT HE DID IT ON BEHALF OR AT THE BEHEST OF THE COMPANY.  
7 MR. PETRUCCI SAW WHAT HE THOUGHT WAS AN INJUSTICE AND HE DECIDED  
8 TO TAKE MATTERS INTO HIS OWN HANDS, AND TO GET SOME PUBLICITY AS  
9 BEST HE KNEW HOW. BUT I --

10 WHETHER OR NOT THEY DECIDE TO SUE MR. PETRUCCI THERE  
11 IN CALIFORNIA FOR COMMON-LAW VIOLATIONS THAT THEY FEEL WERE  
12 COMMITTED IN CALIFORNIA I DON'T THINK HAS ANYTHING TO DO WITH  
13 THIS LAWSUIT. MR. PETRUCCI IS NOT A LEGAL OWNER OF THIS  
14 BUSINESS. HE DOESN'T HAVE ANY LEGAL CONNECTION TO IT. DOES HE  
15 HAVE A PERSONAL CONNECTION? CERTAINLY. BUT WHEN WE'RE TALKING  
16 ABOUT LEGALITIES AND LAWSUITS AND FORUMS, WE'VE GOT TO TAKE A  
17 LOOK AT IT FROM THE LEGAL POINT OF VIEW.

18 SO I DON'T THINK THEIR PLANS ON SUING MR. PETRUCCI  
19 FOR DEFAMATION IN CALIFORNIA IMPACTS THIS PARTICULAR MOTION.

20 **MR. CAPEHART:** YOUR HONOR?

21 **THE COURT:** UM-HMM.

22 **MR. CAPEHART:** I BELIEVE COUNSEL'S A LITTLE BIT  
23 MISTAKEN, AND I WANT TO JUST CLARIFY IT. WE AREN'T JUST  
24 PLANNING ON AMENDING IT TO WRITE IN MR. PETRUCCI. IT WOULD BE  
25 AMENDED TO INCLUDE MONSTER VINTAGE BECAUSE WE BELIEVE THAT HE

1     ACTED ON BEHALF OF THAT COMPANY IN HIS ACTIONS AND, AS SUCH,  
2     THEY ARE RESPONSIBLE FOR --

3             **THE COURT:** "THEY" BEING MS. WEST. THERE IS NO  
4     "THEY" EXCEPT MS. WEST.

5             **MR. CAPEHART:** EXCUSE ME. MONSTER VINTAGE IS  
6     RESPONSIBLE. AND IF IT'S THE DBA OF MS. WEST, THAT'S SOMETHING  
7     THAT THE LAWSUIT WOULD FLESH OUT, BUT THERE'S --

8             **THE COURT:** YOU HAVE NO REASON TO BELIEVE THAT --  
9     THAT MONSTER VINTAGE IS INCORPORATED ANYWHERE, DO YOU?

10            **MR. CAPEHART:** WE HAVE NOT BEEN ABLE TO FIND THAT.  
11     THE ONLY THING WE'VE BEEN ABLE TO FIND IS IT'S AN OREGON VERSION  
12     OF A DOING BUSINESS AS.

13            **THE COURT:** RIGHT.

14            **MR. CAPEHART:** AND LAST WE CHECKED IT WAS -- THEY HAD  
15     NOT FILED THEIR PROPER PAPERWORK, AND IT WAS --

16            **THE COURT:** LAPSED.

17            **MR. CAPEHART:** IT WAS LAPSED, AND I DON'T KNOW IF  
18     THAT'S BEEN UPDATED OR NOT.

19            **THE COURT:** OKAY.

20            **MR. CAPEHART:** BUT WE WOULD -- OF COURSE, SO IT WOULD  
21     BE NOT JUST THE SUIT WITH THE INDIVIDUAL BUT ALSO THE BUSINESS,  
22     MONSTER VINTAGE.

23            **THE COURT:** I KNOW, BUT IN THE REAL WORLD, THAT'S THE  
24     SUIT AGAINST THE INDIVIDUAL 'CAUSE THERE IS NO BUSINESS EXCEPT  
25     THE INDIVIDUAL.

1           **MR. CAPEHART:** RIGHT. THEN IT WOULD BE A SUIT  
2 AGAINST BOTH KATHY WEST AND VICTOR PETRUCCI.

3           **THE COURT:** RIGHT. OKAY. WELL, I WAS A LITTLE  
4 SURPRISED, MR. CAPEHART, THAT YOUR PAPERS DIDN'T INCLUDE ANY  
5 COMPETENT EVIDENCE. WHAT I MEAN IS YOU ATTACH THREE PIECES OF  
6 PAPER BUT NO DECLARATION FROM ANYBODY AUTHENTICATING THEM, NO  
7 DECLARATION FROM ANYBODY WITH PERSONAL KNOWLEDGE.

8           I'VE ACTUALLY THOUGHT ABOUT THIS QUITE A BIT, AND  
9 THE -- EVEN AFTER YOU'VE SAID WHAT YOU'VE SAID TODAY, IT SEEMS  
10 TO ME THAT THE -- I WANT TO CALL IT BALANCING ANALYSIS, BUT  
11 THAT'S NOT COMPLETELY ACCURATE BECAUSE IN THE BALANCING, YOU  
12 START WITH A CONSIDERABLE WEIGHT ON THE SCALES ALREADY,  
13 PREWEIGHTED IN FAVOR OF YOUR CLIENT.

14           THIS IS YOUR CLIENT'S DISTRICT OF INCORPORATION --  
15 FUNNY WAY TO SAY IT 'CAUSE IT'S CALIFORNIA, BUT PRINCIPAL PLACE  
16 OF BUSINESS. I ASSUME THAT THE -- MOST OF THE WORK, AT LEAST  
17 THAT WAS DONE BY OR ON YOUR CLIENT'S BEHALF IN ORDER TO ACQUIRE  
18 THE RIGHTS ON WHICH THE CLIENT IS SUING -- MOST OF THAT WORK WAS  
19 DONE HERE IN CALIFORNIA IN THIS DISTRICT.

20           **MR. CAPEHART:** YES, SIR.

21           **THE COURT:** CORRECT?

22           SO ALL THOSE THINGS GIVE YOUR CLIENT'S CHOICE OF  
23 FORUM A FAIR AMOUNT OF WEIGHT TO START OFF WITH. THE SCALES ARE  
24 ALREADY IMBALANCED IN YOUR CLIENT'S FAVOR. BUT I'VE GONE  
25 THROUGH ALL THE OTHER FACTORS THAT THE COURTS RECOGNIZE, AND IT

1 SEEMS TO ME THAT THIS IS ONE OF THOSE UNUSUAL CASES WHERE THE  
2 OTHER FACTORS CLEARLY OUTWEIGH YOUR CLIENT'S CHOICE.

3 AND LET ME -- SINCE YOU'RE FURROWING YOUR EYEBROWS  
4 THERE, LET ME BE A LITTLE CLEARER, AND THEN I'LL GIVE YOU A  
5 WRITING ON THIS IN THE NEXT DAY OR TWO, BUT THIS IS UNUSUAL  
6 IN -- FIRST OF ALL, MS. WEST'S PAPERS -- AND I SAY HER PAPERS  
7 'CAUSE IT REALLY IS HER. I MEAN, WE CAN TALK ABOUT THE DBA  
8 UNTIL WE'RE BLUE IN THE FACE, BUT I PREFER TO ADDRESS REALITY.  
9 THE REALITY IS HER AND HER BOYFRIEND. I MEAN, JUST -- I DIDN'T  
10 KNOW IT WAS HER BOYFRIEND, BUT WHO KNOWS HOW LONG THAT WILL  
11 LAST, WHO KNOWS WHAT THE SITUATION IS.

12 THE UNCONTRADICTED EVIDENCE FROM HER IS THAT SHE HAS  
13 A MEDICAL CONDITION THAT WOULD PREVENT HER FROM PHYSICALLY BEING  
14 HERE EVER -- I MEAN, DURING THE FORESEEABLE FUTURE. IF SHE  
15 CAN'T PHYSICALLY BE HERE, SHE CAN'T PARTICIPATE IN A MEDIATION  
16 IN THE WAY THE COURT WANTS PEOPLE TO PARTICIPATE IN A MEDIATION  
17 IN THE WAY THAT PARTICIPATION IN MEDIATION, THE COURT BELIEVES  
18 AS A MATTER OF GENERAL PUBLIC POLICY, IS ESSENTIAL TO ITS  
19 PRODUCTIVITY AND FAIRNESS.

20 MORE IMPORTANTLY THAN THAT, SHE COULDN'T PARTICIPATE  
21 IN THE TRIAL. AND BY YOUR -- PHYSICALLY. SHE COULD BE DEPOSED,  
22 OBVIOUSLY. PRESUMABLY WOULD BE DEPOSED IN OREGON. HER  
23 DEPOSITION COULD BE VIDEOTAPED. BUT YOUR PAPERS MAKE HER PERSON  
24 THE CENTER OF THE CASE BECAUSE THE COMPLAINT ACCUSES HER OF  
25 KNOWINGLY, WILLFULLY, MALICIOUSLY CHEATING.

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-8404**

1 "YOU KNEW ABOUT OUR MARK" IS WHAT THE PAPERS SAY.  
2 "YOU'RE A GREEDY AND LAZY PERSON, MISS WEST. YOU KNEW ABOUT OUR  
3 MARK AND YOU RACED OUT THERE AND YOU TRIED TO CAPITALIZE ON IT  
4 FOR YOUR GREEDY, LAZY PURPOSES EVEN THOUGH WE SPENT ALL THIS  
5 TIME AND MONEY BUILDING UP THE POWER OF OUR MARK IN YOUR USED  
6 BIG WOMEN'S CLOTHING MARKET."

7 SO THE TARGET OF THE SUIT IS HER CHARACTER, HER  
8 INTEGRITY, THE QUALITY OF HER PERSONHOOD. WHEN THAT'S THE  
9 TARGET OF THE SUIT, SHE HAS AN IMMENSELY ACUTE INTEREST IN BEING  
10 HERE PHYSICALLY SO THE JURY CAN ASSESSES HER PERSONHOOD SO THAT  
11 SHE CAN TAKE THE STAND AND TESTIFY, SO THAT SHE CAN MOVE HER  
12 TESTIMONY TO BE RESPONSIVE TO THE THINGS THAT YOU AND YOUR  
13 CLIENT RAISE ABOUT HER SO THAT SHE CAN PRESENT HER PERSON AND  
14 LET THE JURY DECIDE WHETHER HER PERSON IS AS EVIL AS THE PAPERS  
15 CLAIM.

16 AND VIDEOTAPED DEPOSITION ABSTRACTS HER. AND THAT'S  
17 THE BEST -- I'M ASSUMING IT WOULD BE VIDEOTAPED AND NOT JUST  
18 TYPED BECAUSE THAT COMPOUNDS THE ABSTRACTION. ABSTRACTING  
19 DEPERSONALIZES, MAKES IT EASIER -- AN ABSTRACTED PERSON IS AN  
20 EASIER PERSON TO CONDEMN THAN A LIVE, REAL, FLESH-AND-BLOOD  
21 PERSON SITTING IN FRONT OF YOU. I KNOW THAT AS A JUDGE OF 20  
22 YEARS.

23 AND A TRIAL IS AN ORGANIC SORT OF NON-LINEAR  
24 MOVING-AROUND DIALECTICAL PROCESS. AND IN THAT PROCESS, THINGS  
25 HAPPEN OFTEN THAT NO ONE REALLY ANTICIPATES. CERTAINLY WOULDN'T

1 BE FULLY ANTICIPATED AT THE TIME OF A DEPOSITION IN MY COURT,  
2 WHICH WOULD BE MONTHS BEFORE THE TRIAL OR IT WOULDN'T HAPPEN AT  
3 ALL.

4 SO IT'S GOING TO BE MONTHS BEFORE THE TRIAL, STUFF  
5 HAPPENS AFTER THE DEPOSITION PRETRIAL, STUFF HAPPENS AFTER THE  
6 DEPOSITION IN THE FINAL PRETRIAL CONFERENCE, STUFF OF  
7 CONSEQUENCE HAPPENS, UNFORESEEN -- UNFORESEEABLE AFTER THE  
8 DEPOSITION IN THE TRIAL ITSELF, AND SHE CAN'T RESPOND BECAUSE  
9 HER STORY HAS BEEN FROZEN ON THE VIDEOTAPE. AND SHE'S  
10 ABSTRACTED. SHE CAN'T BE HERE.

11 GIVEN THE PRIMARY TARGET OF THIS CASE, IT COMPROMISES  
12 WAY TOO SERIOUSLY THE JUDICIAL SYSTEM'S ABILITY TO DO JUSTICE,  
13 TO HAVE A FAIR PLAYING FIELD. THAT'S A HUGE FACTOR.

14 NOW, THE OTHER THING IS THAT ALL OF THE WITNESSES  
15 THAT SHE HAS IDENTIFIED WHO WOULD PROVIDE TESTIMONY, FOR  
16 EXAMPLE, ABOUT WHAT SHE KNEW AT THE TIME SHE ADOPTED THIS MARK  
17 OF HER OWN ABOUT WHETHER SHE HAD CLUE ABOUT MONSTER CABLE, ABOUT  
18 WHAT HER MOTIVES WERE, ABOUT WHAT HER THOUGHT PROCESS WAS, ABOUT  
19 HER CHARACTER, THINGS THAT ARE CENTRAL TO THE CASE, ALL THOSE  
20 WITNESSES ARE OUTSIDE THIS -- THIS COURT'S SUBPOENA -- SUBPOENA  
21 RANGE. THERE'S NO GUARANTEE THAT SHE COULD REQUIRE THEM TO BE  
22 HERE.

23 ALL OF YOUR WITNESSES BEING BY -- NOT YOUR  
24 PERSONALLY, OBVIOUSLY -- YOU -- MONSTER CABLE'S WITNESSES ARE  
25 WITHIN THIS COURT'S SUBPOENA RANGE. THAT'S FINE. BUT MORE



1 IMPORTANTLY, THEY'RE CONTROLLED BY MONSTER CABLE. MONSTER CABLE  
2 WILL GET THEM TO PORTLAND. IT WILL PAY. THEY WILL FLY, AND  
3 THEY WILL TESTIFY.

4 SHE CAN'T HAVE ANY COMPARABLE LEVEL OF ASSURANCES IF  
5 THE CASE IS TRIED HERE THAT THE WITNESSES WHO SHE WANTS TO  
6 TESTIFY WILL BE HERE TO TESTIFY. THEY'RE NOT HER EMPLOYEES.  
7 SHE DOESN'T CONTROL THEM. IT LOOKS LIKE THEY ARE SMALL BUSINESS  
8 CONTRACT-TYPE PERSONS THEMSELVES WHO PROBABLY DON'T HAVE VERY  
9 MUCH MONEY. SHE'D HAVE TO PAY THEM PRESUMABLY TO GET DOWN HERE,  
10 AT LEAST PAY THEIR TRAVEL EXPENSES.

11 THE MOST -- IN THE MOST RECENT YEAR HER COMPANY  
12 GROSSED \$15,000. IT WOULD COST THEM VERY SUBSTANTIAL PERCENTAGE  
13 OF HER GROSS REVENUE TO PAY FOR THE PEOPLE TO COME DOWN HERE AND  
14 FOR HER TO GET DOWN HERE ANYWAY, WHICH THEY CAN'T ANYWAY  
15 PHYSICALLY.

16 NONE OF THOSE DISABILITIES WOULD COMPROMISE MONSTER  
17 CABLE'S CAPACITY TO GET A FAIR TRIAL IN PORTLAND. THERE'S NO  
18 REASON TO BELIEVE THAT MONSTER CABLE COULDN'T GET A COMPLETELY  
19 FAIR TRIAL AND PRESENT ALL ITS WITNESSES IN PORTLAND. THERE'S  
20 SUBSTANTIAL REASON TO BELIEVE SHE COULDN'T, IF THE CASE  
21 PROCEEDED HERE --

22 AND YOU'RE FROWNING ABOUT MY STATEMENTS ABOUT MONSTER  
23 CABLE BEING ABLE TO GET ITS WITNESSES UP THERE. IS THERE  
24 SOMETHING THAT I DON'T UNDERSTAND ABOUT WHY THEY COULDN'T GET  
25 THEIR WITNESSES UP THERE, "THEY" BEING MONSTER CABLE?

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-8404**

1           **MR. CAPEHART:** ACTUALLY, YOUR HONOR, I WAS JUST KIND  
2 OF THINKING OF SOME OF THE POINTS. ACTUALLY, THE -- ONE OF THE  
3 MAIN WITNESSES HAS LEFT MONSTER CABLE. HE IS NO LONGER AN  
4 EMPLOYEE.

5           **THE COURT:** UM-HMM. WHO'S HE? I DON'T MEAN HIS  
6 NAME. WHAT'S HIS FUNCTION?

7           **MR. CAPEHART:** HE WAS THE DIRECTOR OF MARKETING, AND  
8 HE HAS INTIMATE KNOWLEDGE OF THE MARKS -- OF MONSTER'S MARKS AND  
9 THEIR PRODUCTS AND THINGS ALONG THOSE LINES. SO HE IS NO LONGER  
10 AN EMPLOYEE AND OUT OF OUR CONTROL.

11           **THE COURT:** IS THERE SOME REASON TO BELIEVE THAT IF  
12 MONSTER PAID HIM APPROPRIATELY TO REIMBURSE HIS EXPENSES AND FOR  
13 HIS LOST BUSINESS TIME THAT HE WOULD NOT GO TO PORTLAND AND  
14 TESTIFY?

15           **MR. CAPEHART:** I THINK IT'S VERY POSSIBLY THAT HE  
16 WOULD GO ALONG. IT'S JUST THE SAME --

17           **THE COURT:** SO THE ANSWER IS NO TO MY QUESTION.

18           **MR. CAPEHART:** THE ANSWER IS NO. IT'S JUST -- IT'S  
19 BOTH PARTIES -- I DON'T THINK -- THEY HAVEN'T INDICATED --

20           **THE COURT:** NO, NO. THERE'S A HUGE DIFFERENCE.  
21 MONSTER CABLE HAS TONS OF MONEY. MISS WEST DOESN'T HAVE HARDLY  
22 ANY MONEY. SO MONSTER CAN PAY EASILY FOR PEOPLE TO GO TO  
23 PORTLAND. SHE CAN'T PAY EASILY FOR PEOPLE TO COME DOWN HERE AND  
24 TESTIFY.

25           ALL RIGHT. WELL, THE SUBSTANTIVE -- THE COURT'S

1 INTEREST IN MAKING SURE THAT SUBSTANTIVE JUSTICE -- AND I DON'T  
2 KNOW WHAT THE SUBSTANTIVE OUTCOME IS, OBVIOUSLY. I HAVE NO  
3 IDEA. ALL I'M TALKING ABOUT IS PROCESS MATTERS. BUT THE  
4 PROCESS MATTERS WEIGH VERY HEAVILY IN HER FAVOR, AND THEY ARE  
5 REINFORCED BY THE COURT'S OBLIGATION TO DO WHAT IT CAN TO MAKE  
6 SURE THAT THE PROCESS IS NOT LOGISTICALLY SKEWED UNNECESSARILY  
7 AND SIGNIFICANTLY IN ONE LITIGANT'S FAVOR. AND THE PLACE WHERE  
8 IT WOULD BE FAIREST IS IN PORTLAND.

9 **MR. CAPEHART:** I UNDERSTAND. MAY I MAKE JUST TWO  
10 POINTS?

11 **THE COURT:** SURE.

12 **MR. CAPEHART:** FIRST ON HER AFFIDAVIT, THE MEDICAL --  
13 YOU'RE TALKING ABOUT HOW SHE COULDN'T TRAVEL.

14 **THE COURT:** UH-HUH.

15 **MR. CAPEHART:** THE MEDICAL STATEMENT CAME FROM A  
16 DOCTOR FROM VANCOUVER, WASHINGTON.

17 **THE COURT:** WELL, THAT'S RIGHT ACROSS THE RIVER FROM  
18 WASHINGTON.

19 **MR. CAPEHART:** THAT'S RIGHT ACROSS --

20 **THE COURT:** YEAH. THERE'S A VANCOUVER CANADA --

21 (SIMULTANEOUS COLLOQUY.)

22 **THE COURT:** RIGHT. VANCOUVER, WASHINGTON IS  
23 APPROXIMATELY A FOUR-MINUTE BRIDGE RIDE.

24 **MR. CAPEHART:** AND --

25 **THE COURT:** IS THAT RIGHT, MISS DAVIS?

1           **MS. DAVIS:** THAT'S EXACTLY RIGHT, YOUR HONOR.

2           **MR. CAPEHART:** SO THEN -- BUT THE -- AGAIN, THOSE  
3 MEDICAL RECORDS ARE OUTSIDE THE SUBPOENA POWER OF OREGON.

4           **THE COURT:** WELL, SO I GO TO -- WE'RE A NATIONAL  
5 SYSTEM. YOU GO TO -- YOU GO TO GET THE RECORDS. CAN'T FORCE  
6 SOMEONE TO COME FROM THERE AND TESTIFY NECESSARILY. THAT'S A  
7 DIFFERENT PROBLEM. BUT I'LL BET YOU A MILLION DOLLARS THAT  
8 THOSE -- THAT MISS DAVIS WILL COOPERATE WITH YOU AND HER CLIENT  
9 WILL COOPERATE WITH YOU, ASSUMING THAT THERE'S NO ADVERSE  
10 ECONOMIC CONSEQUENCE TO DR. ALEXANDER, TO GET HIM TO PROVIDE THE  
11 DOCUMENTS WITHOUT A BIG HASSLE AND TO GIVE TESTIMONY.

12           **MS. DAVIS:** THAT'D BE A GOOD BET, YOUR HONOR.

13           **THE COURT:** HIS TESTIMONY IS IRRELEVANT TO THE TRIAL.  
14 I MEAN, HE'S NOT GOING TO GET UP AND SAY, "OH, YOU KNOW, SHE'S  
15 GOT A HIP INJURY, AND THEREFORE SHE DIDN'T VIOLATE YOUR CLIENT'S  
16 TRADEMARK RIGHTS." SO HE'S NOT REALLY -- I DON'T SEE ANY  
17 IMPORTANCE OF HIS TESTIMONY TO THE CASE ITSELF. HIS INPUT HERE  
18 IS UNCONTRADICTED.

19           **MR. CAPEHART:** YOUR HONOR, THE ONLY -- I WOULD ASK,  
20 THOUGH, SINCE THIS WAS FILED AS A -- IN THE REPLY AND WE HAVE  
21 NOT HAD AN OPPORTUNITY --

22           **THE COURT:** NO, YOU'VE HAD -- HOW LONG HAVE YOU HAD  
23 THIS REPLY?

24           **MR. CAPEHART:** WE'VE HAD IT 14 DAYS.

25           **THE COURT:** OKAY. THAT'S PLENTY OF TIME TO FILE A

1 REQUEST WITH THE COURT. OBVIOUSLY MONSTER CABLE HAS PLENTY OF  
2 MONEY, PLENTY OF CAPACITY TO HIRE VERY GOOD LAWYERS. YOU'VE  
3 DONE A GOOD JOB IN YOUR PAPERS HERE. I MEAN, THE -- SERIOUSLY.  
4 AND YOU'VE DONE A GOOD JOB OF DESCRIBING THE VAN DUSEN CASES AND  
5 THE OTHER CASES THAT SET THE STAGE APPROPRIATELY FOR A BIAS IN  
6 FAVOR OF YOUR CLIENT THAT CAN ONLY BE OVERCOME ON A STRONG  
7 SHOWING.

8 YOU'VE DONE ALL THAT. THERE'S NO REASON TO BELIEVE  
9 THAT YOU DIDN'T HAVE A FULL OPPORTUNITY. WE GOT TO MOVE ON.  
10 THIS IS A CASE THAT'S DOING SERIOUS HARM APPARENTLY TO HER  
11 CAPACITY TO KEEP HER MIND ON HER BUSINESS AND NOT BE  
12 APPREHENSIVE ABOUT WHAT'S GOING ON, SO WE GOT TO MOVE THE CASE,  
13 AND IT'S GOING TO MOVE IN PORTLAND.

14 **MR. CAPEHART:** YES.

15 **THE COURT:** YOU GET MORE BILLABLE HOURS. FLY UP TO  
16 PORTLAND.

17 **MR. CAPEHART:** WELL, I TRY NOT TO --

18 **THE COURT:** OKAY. YOU'LL GET A RULING IN WRITING. I  
19 HOPE I'LL PUT IT IN THE MAIL BY FRIDAY.

20 **MS. DAVIS:** THANK YOU, YOUR HONOR.

21 **THE COURT:** BUT THE CASE IS GOING TO BE REMOVED TO  
22 THE DISTRICT COURT IN PORTLAND.

23 **MS. DAVIS:** THANK YOU.

24 **MR. CAPEHART:** YES, SIR.

25 **MS. DAVIS:** BYE.

(PROCEEDINGS WERE CONCLUDED AT 2:30 P.M.)

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**CERTIFICATE OF REPORTER**

I, RAYNEE H. MERCADO, OFFICIAL REPORTER FOR THE UNITED STATES COURT, NORTHERN DISTRICT OF CALIFORNIA, HEREBY CERTIFY THAT THE FOREGOING PROCEEDINGS IN C04-2778WDB, MONSTER CABLE V. MONSTER VINTAGE, WERE REPORTED BY ME, A CERTIFIED SHORTHAND REPORTER, AND WERE THEREAFTER TRANSCRIBED UNDER MY DIRECTION INTO TYPEWRITING; THAT THE FOREGOING IS A FULL, COMPLETE AND TRUE RECORD OF SAID PROCEEDINGS AS BOUND BY ME AT THE TIME OF FILING.

THE VALIDITY OF THE REPORTER'S CERTIFICATION OF SAID TRANSCRIPT MAY BE VOID UPON DISASSEMBLY AND/OR REMOVAL FROM THE COURT FILE.

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RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR

THURSDAY, JANUARY 6, 2005

**RAYNEE H. MERCADO, CSR, RMR, CRR, FCRR (510) 451-8404**

# CLIENT COPY

January 20, 2005

Brenna Legaard, Esq.  
Chernoff, Vilhauer, McClung & Stenzel, LLP  
1600 S. W. Second Avenue  
Portland, OR 97204-3157

Re: Monster Cable Products, Inc. v. Monstervintage.com

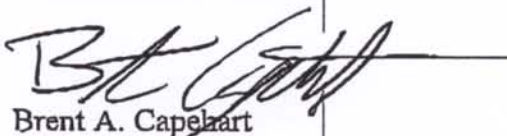
Dear Brenna,

This is in response to your letter dated January 17, 2005. We must reject your contention that the above lawsuit was groundless. The basis for the dismissal was due to reasons not entirely related to your client's actions nor based on the merits of the case.

Our dismissal was made without prejudice. Monster therefore is not restricted in taking further action should it believe that action is warranted. We will convey your statement of your client's actions, including its present and future uses of the mark MONSTERVINTAGE and logo to our client, and it has noted your client's continued harassment of our client through her website. Whether or not further response is made in the near future, Monster reserves all rights up to the applicable dates of the statutes of limitation to protect its rights in this matter.

Very truly yours,

LARIVIERE, GRUBMAN & PAYNE, LLP



Brent A. Capelhart

BAC/sgs

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