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ADVERTISING LAW

NEWSLETTER OF THE ADVERTISING, MARKETING & MEDIA PRACTICE GROUP OF MANATT, PHELPS & PHILLIPS, LLP

IN THIS ISSUE

- **50 Cent Ploy Is Costing Taco Bell Plenty**
- **Congress Clashes With CPSC Over Chemical Ban in Toys**
- **Online Jewelers Engage in Gem Warfare**
- **Barbie Beats the Bratz**
- **Monster Cable Target Pleads Its Case on eBay**
- **Cast Your Vote For BitterLawyer.com**

50 Cent Ploy Is Costing Taco Bell Plenty

A tongue-in-cheek ad campaign has backfired for retail food chain Taco Bell.

In July, 50 Cent (nee Curtis Jackson), sued Taco Bell over an "open letter" the chain sent over the PR wires encouraging the rapper to go to one of their stores, rap his order, and then change his name to 79, 89 or 99 Cent for the day. For his time and effort, the letter promised that parent company Yum Brands would donate \$10,000 to the charity of his choice.

Fitty was not amused. In his complaint, he argued the offer gave the appearance of his consent to the promotion, which he had not given. News of the lawsuit appeared briefly, then disappeared until last week, when a reporter incorrectly reported that the chain had countersued, and reprinted some of the rather strong language in what was actually Taco Bell's answer to the complaint.

In court papers, Taco Bell describes Jackson as someone who uses his "colorful past to cultivate a public image of belligerence and arrogance," and has a "well-publicized track record of making threats, starting feuds, and filing lawsuits."

"At the same time, Jackson holds himself out as a giver to charity and one who wants to give back to his community. This lawsuit is another of Jackson's attempts to burnish his



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gangsta rapper persona by distorting beyond all recognition a bona fide, good faith offer that Taco Bell made to Jackson," the answer continues.

Taco Bell and its Yum Brands counterparts are known for their irreverent promotions. Last year, KFC offered to give \$260,000 to its Colonels Scholars, a charity providing college scholarships, in the name of any scoring player willing to do a chicken dance in the end zone. During March madness this year, Pizza Hut offered free pizza to the entire campus of any bottom-seeded basketball team that beat a top seed (something that has never been done). Twelve years ago, on April Fools Day 1996, Taco Bell took out full page ads in six major newspapers and claimed it had bought the Liberty Bell and was renaming it the Taco Liberty Bell.

[back to top](#)

Congress Clashes With CPSC Over Chemical Ban in Toys

In August, in the wake of a series of highly publicized crises over imported toys containing illegally high amounts of lead and other banned substances, Congress passed legislation raising safety standards for toys and banning several hormone-like substances called phthalates in products for kids under 12.

Congressional supporters of the new law want toys containing the controversial chemicals off the shelves when the statute goes into effect on February 10, according to a statement by Sen. Dianne Feinstein, D-Calif.

But recently, Consumer Product Safety Commission General Counsel Cheryl Falvey released a legal opinion stating that stores may continue to sell toys with phthalates, as long as those items were manufactured prior to February 10. Falvey said that the lawmaker's intention on this question was ambiguous.

In a letter sent to the CPSC days shortly after the legal opinion was released, Feinstein and three members of the House of Representatives urged Falvey to reverse her decision. The opinion means that toys with phthalates could stay in stores for years, with no way for consumers to know which toys contain the chemicals, Feinstein stated.

Lawmakers are worried about the effect of phthalates on the developing hormone systems of children. For instance, a

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USA Weekend Magazine
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recent study found that boys born to mothers with high phthalate levels were more likely to have undescended testicles and small penises. Phthalates are present in myriad consumer products ranging from rubber ducks to shower curtains.

Sen. Barbara Boxer, D-Calif., also wrote a letter to the CSPC. Falvey's interpretation of the safety bill "is harmful to our children and a blatant disregard for the law," Boxer said in a statement. "Ms. Falvey's claim that our intent was not clear is a pathetic and transparent attempt to avoid enforcing this law. It is beyond me that as they exit the scene, this administration is still carrying out its malicious actions to weaken environmental protection for our families."

CPSC spokeswoman Julie Vallese said her agency is committed to protecting children from dangerous chemicals. But she said the agency has to enforce the statute as written and new safety standards have never applied to products made before the standards go into effect. "The authors of the legislation should have done their homework," Vallese said in a statement. Noting that Falvey is a career government employee, not a political appointee, Vallese added, "Senator Boxer should know better than to attack the hard work and dedication of career employees."

[back to top](#)

Online Jewelers Engage in Gem Warfare

Internet jewelry retailers Blue Nile and Yehuda Diamond Co. are accusing each other of false advertising for failing to disclose chemical treatment of some of their gems.

In a lawsuit filed last month in Manhattan federal court, Yehuda claimed that Blue Nile sold treated emeralds without providing consumers with the full disclosure required under Federal Trade Commission guidelines. The complaint charged Blue Nile with violations of the federal Lanham Act and New York State consumer protection laws, and requested that the court order Blue Nile to offer a full refund to any customers who purchased emeralds or emerald jewelry.

According to the complaint, "Blue Nile uses oil filling (including filling by oil, wax, resin or other colorless substances) to enhance the appearance of the emeralds (including those in jewelry) it sells via the Web site at BlueNile.com." In support of its claim, Yehuda states that the Gemological Institute of America has determined that Blue Nile emeralds contain

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“Moderate clarity enhancement.”

Oil filling is a treatment that decreases the value of gemstones, fades over time, and requires special care—information that Blue Nile did not disclose to consumers on its site, the lawsuit states. “The only enhancement method disclosed by Blue Nile on its Web site, with respect to gemstones (including emeralds) is heating,” the complaint states.

Yehuda admits that its rival now includes a section on oil-treated gemstones on its site, but wants the court to order Blue Nile to offer refunds to consumers who made purchases before the information was posted.

In a statement provided to “National Jeweler,” Blue Nile stated that Yehuda’s claims were without merit and made in response to a false comparative-advertising case filed by Blue Nile against Yehuda last year. In February 2008, Blue Nile sued Yehuda parent company Diascience Corp. of New York in Seattle federal court. The complaint accused Yehuda of making “false and misleading statements” on its Web site comparing its clarity-enhanced diamonds to natural diamonds sold by Blue Nile.

[back to top](#)

Barbie Beats the Bratz

A California district court has essentially handed control of MGA Entertainment’s Bratz franchise over to Mattel, the maker of the iconic Barbie.

It’s a huge win for Mattel and a potentially fatal blow for MGA, the manufacturer of the pouty-lipped, big-headed hip-hop-themed Bratz dolls, which had been cutting into Barbie sales in recent years.

The court’s decision came several months after a jury found the Bratz dolls were originally conceived by a designer who secretly worked on the concept with MGA while he was employed by Mattel.

The order prohibits MGA from making, producing or licensing a wide range of products, including the Bratz line’s main characters, Sasha, Jade, Cloe, and Yasmin. In a further setback for MGA, the ruling requires it to return all unsold product to Mattel. However, the order will not go into effect until February at the earliest, meaning MGA can continue to

sell Bratz dolls through the holidays.

For both Mattel and MGA, the court order represents a watershed event. After being handed control of Barbie's fiercest rival, Mattel must now decide whether to make and market the dolls itself, strike an agreement allowing MGA to continue making the dolls under a license from Mattel, or snuff out the brand entirely.

Mattel-made Bratz dolls could represent a sizable profit stream, but also bring the risk of cannibalizing Barbie sales and even damaging Barbie's "good girl" image. On the other hand, Mattel already shares shelf space with products it licenses from other companies, including Walt Disney Co. And although Bratz sales have recently been on the decline, the dolls will generate about \$300 million in revenue this year for MGA.

As Mattel mulls what to do, Bratz's relationship with retailers is increasingly iffy. Analysts predict that stores will probably stop buying Bratz products to avoid the headache of seeking reimbursements from MGA for any inventory returned to Mattel. MGA is already facing a reduction in orders. For instance, Target has reduced shelf space for Bratz by 50%.

Observers say a joint venture between Mattel and MGA is unlikely, although that is probably the best bet for MGA. Bratz is, by far, MGA's most lucrative brand.

[back to top](#)

Monster Cable Target Pleads Its Case on eBay

Monster Cable is fiercely protective of its trademark, regularly sending cease-and-desist letters to a wide array of others using "Monster" in their name, including the television show "Monster Garage" and the movie "Monsters, Inc."

Earlier this year, the audio cable company went after a small mini-golf chain in California called Monster Mini Golf. In an interesting fundraising technique, the target is seeking money and sympathy via the online auction site eBay, auctioning \$1 printable coupon that entitle buyers to a \$2 round of mini golf at any of the company's locations.

In its eBay entry, which can be viewed [here](#), the Monster Mini Golf pleads its case – and bashes Monster Cable – at length. The company, which describes itself as a small husband-and-

wife operation, claims that the founder of Monster Cable has forced "414 companies" into a settlement in which they turn over the rights to the use of "Monster" in name to Monster Cable Inc, who then licenses it back to them for a fee.

"Each small business that was forced to sign over their name is one more brick in the massive Monster Cable Inc wall, held together by the blood of those crushed beneath their corporate wheels. It is very very sad."

But Monster Mini Golf says Monster Cable has met its match in them. "We have decided to continue on and fight the good fight," the company states in its eBay plea.

Stating that their legal fees are already "well over \$100,000... and will likely reach \$250,000 when all is said and done," Monster Mini Golf is "selling a 'Piece' of our legal defense and a small slice of Justice to you for \$1."

[back to top](#)

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Kudos to Manatt client Bitterlawyer.com, the critically acclaimed Web series and ABA top 100 law "blawg" contender for 2008. (The ABA site identifies it as "Living the Dream").

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[back to top](#)