

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS**

OPOWER, INC.	)	
	)	
Plaintiff,	)	Civil Action No. _____
	)	
v.	)	TRIAL BY JURY REQUESTED
	)	
EFFICIENCY 2.0, LLC	)	
	)	
Defendant.	)	
	)	
	)	
	)	

**COMPLAINT FOR COPYRIGHT INFRINGEMENT,  
UNFAIR COMPETITION AND UNFAIR AND DECEPTIVE TRADE PRACTICES**

Plaintiff Opower, Inc., by and through its undersigned counsel, for its Complaint against Defendant Efficiency 2.0, LLC, states and alleges as follows:

**PARTIES**

1. Plaintiff Opower, Inc., formerly known as Positive Energy, Inc., is a corporation organized under the laws of Delaware, with a principal place of business located at 1515 N. Courthouse Rd., 8<sup>th</sup> Floor, Arlington, Virginia 22201 (“Opower”).

2. Opower is a leader and innovator in the field of home energy usage reporting. In particular, Opower is well known for its signature Home Energy Reports, paper reports mailed periodically to residents. These Home Energy Reports, for which Opower has attained multiple copyright registrations, allow a resident to compare his or her own energy consumption with that of similarly situated neighbors. The reports are designed in an easy-read, visually compelling format, and have been shown to reduce home energy consumption by substantial amounts. Opower has achieved marked commercial success with sales of its Home Energy Reports.

3. On information and belief, Defendant Efficiency 2.0, LLC is a limited liability company organized under the laws of Delaware, with a principal place of business located at 165 William St, Floor 10, New York, New York 10038 (“E2.0”).

4. E2.0 entered the paper home energy reporting business after Opower’s rise to prominence.

5. E2.0 and Opower are direct competitors.

6. As detailed below, E2.0 recently launched a report nearly identical to Opower’s signature Home Energy Report. This report infringes Opower’s copyrighted works, and causes consumers to be confused into thinking that they are Opower’s own reports.

7. Opower brings this complaint for copyright infringement, federal unfair competition and unfair and deceptive trade practices under Massachusetts law to put an immediate end to E2.0’s infringing and confusing campaign.

### **JURISDICTION AND VENUE**

8. This action arises, in part, under the Copyright Laws of the United States, 17 U.S.C. §501 et seq. and Federal Unfair Competition Law, 15 U.S.C. § 1125(a). Therefore, the Court has subject matter jurisdiction under 28 U.S.C. §§ 1331 (federal question) and 1338 (copyright and trademark and unfair competition claims) and 1121 (Lanham Act claims).

9. The Court also has subject matter jurisdiction under 28 U.S.C. § 1332 because the suit is between parties of different states and the amount in controversy exceeds seventy-five thousand dollars (\$75,000).

10. This Court has jurisdiction over the state law claim under the doctrine of supplemental jurisdiction under 28 U.S.C. § 1367. The state law claim arises from or is substantially related to the same acts giving rise to the federal claims.

11. This Court has personal jurisdiction over Defendant E2.0 for the reason that E2.0 conducted and continues to conduct substantial business in the Commonwealth of Massachusetts, and a substantial part of the events or omissions giving rise to the claims occurred in this District. Among other things, E2.0 regularly supplies its accused Energy Savings Reports to utility company customers in Massachusetts. It has also contracted with the utility company Western Massachusetts Electric Company (“WMECO”), a Massachusetts corporation headquartered in Massachusetts, to provide its home energy reporting services to WMECO’s Massachusetts customers. E2.0 has engaged in a regular, continuous and systemic course of business in this judicial district and has caused in this district and elsewhere harm to Opower that is alleged in this complaint.

12. Venue in this district is proper under 28 U.S.C. § 1391(b) and (c) and 1400(a) because a substantial part of the infringing activity and unfair competition occurred and continues to occur in the District of Massachusetts, and E2.0 is amenable to personal jurisdiction in this district.

### **FACTUAL BACKGROUND**

13. Opower was founded in 2007 with the goal of finding a practical way to engage residential energy users to reduce their home energy consumption on a large scale.

14. Opower envisioned a report that would be sent on a regular basis to the customers of utility companies, and which would permit residential energy users to readily digest their own energy use and to understand their consumption relative to that of neighbors with like homes (i.e., square footage, heat type, etc.).

15. After months of drafting, in October 2007, Opower completed the first draft of its report.

16. Opower continued to revise the design of its report over the next three months, until finally, in January 2008, it settled upon a final report.

17. Opower registered this final version of its Home Energy Report with the Copyright Office in September 2009, as indicated on registration certificate number VA 1-692-228. It also registered several later derivative reports with the Copyright Office, as indicated on registration certificate numbers TX 7-435-604 and TX 7-435-609 issued by the United States Copyright Office (collectively, the foregoing being the “Registered Reports”). True and correct copies of these certificates for the Registered Reports are attached as Exhibits A through C, respectively.

18. Opower’s reports (known generally as Home Energy Reports) have been extremely commercially successful. Opower now sends out Home Energy Reports on behalf of 60 utility companies across the country, including eight of the ten largest, reaching about 2.9 million households. Close to half a million customers in Massachusetts alone receive the reports, and Opower has printed over 19 million reports to date nationwide. Opower’s success has been recognized by mainstream media, environmental groups, and even the nation’s political leaders.

19. Opower’s Home Energy Reports embody a unique style, signature design, and overall look-and-feel which are instantly recognizable. Opower’s reports have become well known and distinctive to utility companies and their customers—end users of energy provided by utility companies. These consumers and potential consumers have come to associate the unique style, signature design, and overall look-and-feel of Opower’s proprietary Home Energy Reports with a single source.

20. As a result of the unique style, distinctive brand, and innovative designs of Opower's Home Energy Reports, Opower has become a well-known single source associated with unique and innovative home energy comparison reports.

#### Defendant's Unlawful Conduct

21. E2.0 was founded in late 2008.

22. E2.0 contracts with utilities to, among other things, send periodic paper reports to the utilities' customers.

23. E2.0's paper reports, which it calls "Energy Savings Reports," compare a user's energy consumption with that of similarly situated neighbors.

24. On information and belief, E2.0 is responsible for the creation, printing and distribution to the utilities' customers of the paper reports.

25. On information and belief, E2.0 contracts with vendors (including DataMail, Inc.) for the printing and mailing of its reports.

26. On information and belief, E2.0 has been sending out paper reports to WMECO customers in Massachusetts as part of an energy savings pilot program.

27. On information and belief, Exhibit D shows a model of report that is being sent to WMECO customers on a regular basis as part of the energy savings pilot program.

28. On information and belief, E2.0 is responsible for the regular printing and distribution of individualized versions of the report shown at Exhibit D to WMECO's customers.

29. E2.0 knew of Opower prior to the creation of the report shown at Exhibit D.

30. On information and belief, the designers of the report shown at Exhibit D had viewed one or more of the Registered Reports prior to creating the report shown at Exhibit D.

31. The report shown at Exhibit D is nearly identical to one or more of the Registered Reports. The substantial similarities include, but are not limited to, overall layout and blocking, use of open space, use of language, use of font, bolding, accents and color, as well as selection and presentation of specific graphs and information.

32. On information and belief E2.0 is using, or intends to use, data collected from the WMECO Western Mass Saves pilot study to support claims that E2.0's energy savings programs are effective.

33. E2.0 and Opower attend the same trade shows.

34. Opower and E2.0 compete for the same utility customers.

35. Opower is being irreparably harmed by E2.0's infringement, unfair competition and unfair trade practices.

#### FIRST CLAIM FOR RELIEF

##### COPYRIGHT INFRINGEMENT (17 U.S.C. § 101 et seq.)

36. Opower restates and realleges the preceding paragraphs as if fully set forth herein.

37. The Registered Reports are original works of authorship, embodying copyrightable subject matter, and copyrighted under the laws of the United States.

38. Opower is the sole and exclusive owner of all rights, title and interest in and to the Registered Reports.

39. The copyrights in the Registered Report and the facts stated in the certificates are *prima facie* valid under 17 U.S.C. § 410(c).

40. By their actions alleged above, E2.0 has infringed Opower's copyrights in one or more of the Registered Reports in violation of the Copyright Act, 17 U.S.C. § 501, by producing,

displaying and distributing reports, including the report shown at Exhibit D, which are the same, strikingly, and/or substantially similar to the Registered Reports (the “Accused Reports”).

41. E2.0 had access to one or more of the Registered Reports prior to the production and distribution of the Accused Reports.

42. E2.0 or those acting in privity with E2.0 copied one or more of Opower’s Registered Reports in creating the Accused Reports.

43. On information and belief, E2.0’s acts of infringement have been taken willfully, in knowing disregard, and with intentional indifference with respect to Opower’s rights.

44. E2.0’s copyright infringement and the threat of continuing and future infringement have caused, and will continue to cause, repeated and irreparable injuries to Opower.

45. Opower’s remedies at law are not adequate to compensate for the injuries imposed by E2.0’s infringements.

46. Therefore, Opower requires a preliminary and permanent injunction prohibiting E2.0, its agents, employees and other persons acting in conspiracy, concert or participation with it from infringing, in any manner, Opower’s copyrights, and from inducing, aiding, causing or contributing to such infringements by others, in violation of 17 U.S.C. § 502.

47. As a direct and proximate result of E2.0’s infringement of Opower’s copyrights in the Registered Reports, Opower has also suffered certain monetary damages.

48. As a direct and consequential result of E2.0’s willful and intentional infringement of Opower’s exclusive rights under the Copyright Act, 17 U.S.C. § 501, Opower is entitled to recover from E2.0 such actual damages in an amount to be determined at trial, including Opower’s lost profits and/or all of E2.0’s profits gained by its infringement, or at Opower’s

election, statutory damages including damages for willful infringement of up to \$150,000 for each infringement, attorneys' fees, costs, and injunctive relief.

## SECOND CLAIM FOR RELIEF

### FEDERAL UNFAIR COMPETITION 15 U.S.C. § 1125(a)

49. Opower restates and realleges the preceding paragraphs as if fully set forth herein.

50. Due to the distinctive, unique style, design, and signature look-and-feel of Opower's Home Energy Reports, consumers exclusively associate the Home Energy Reports with a single source.

51. The Accused Reports produced and distributed by E2.0 are copies, variations, simulations or colorable imitations of Opower's Home Energy Reports and constitute false designations of origin, and/or false representations that E2.0's report is sponsored, endorsed, licensed or authorized by, or affiliated or connected with Opower.

52. Due to the distinctive nature of Opower's Home Energy Reports, consumers are likely to be confused as to the affiliation, connection, or association of E2.0 or its Accused Reports with Opower and its Home Energy Reports.

53. E2.0's infringing conduct has occurred across state lines in interstate commerce.

54. E2.0's acts are further likely to cause confusion, mistake, or deception as to the origin, sponsorship, or approval of E2.0's Accused Reports.

55. Upon information and belief, E2.0 is attempting to pass its Accused Reports off as Opower's Home Energy Reports in a manner calculated to deceive Opower's customers and members of the general public, in that E2.0 copied the Home Energy Report in an effort to make

E2.0's Accused Reports confusingly similar to the Home Energy Reports and/or pass off E2.0's Accused Reports as Home Energy Reports.

56. Upon information and belief, E2.0 has knowingly created and distributed copies, variations, simulations or colorable imitations of the Home Energy Reports with full knowledge of Opower's intellectual property rights in the Home Energy Reports. Upon information and belief, E2.0's infringement is willful and deliberate.

57. E2.0's acts are in violation of Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a).

58. As a direct and consequential result of E2.0's unlawful conduct, Opower has suffered substantial monetary loss and harm to its business.

59. E2.0's conduct has caused and will continue to cause irreparable injury to Opower unless enjoined by this court. Opower has no adequate remedy at law.

60. As a direct and consequential result of E2.0's willful and intentional infringement, Opower is entitled to actual damages in an amount to be determined at trial, including Opower's lost profits and/or E2.0's profits from infringement, treble damages, attorneys' fees, and injunctive relief.

### THIRD CLAIM FOR RELIEF

#### VIOLATION OF MASSACHUSETTS REGULATION OF BUSINESS PRACTICES FOR CONSUMERS PROTECTION ACT (MGL ch. 93A)

61. Opower restates and realleges the proceeding paragraphs as if fully set forth herein.

62. E2.0's acts have violated the Massachusetts Regulation of Business Practices for Consumers Protection Act (MGL ch. 93A, §2), because E2.0 has engaged in conduct that utilized

unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade and commerce.

63. E2.0 is attempting to pass its Accused Reports off as Opower's Home Energy Reports in a manner calculated to deceive Opower's customers and members of the general public, in that E2.0 copied or caused to be copied the Home Energy Reports in an effort to make E2.0's Accused Report confusingly similar to the Home Energy Reports and/or pass off E2.0's Accused Report as the Home Energy Reports.

64. Consumers are likely to be confused, misled and/or deceived by E2.0's conduct.

65. Upon information and belief, E2.0 willfully engaged in deceptive trade practices by knowingly creating copies, variations, simulations or colorable imitations of the Home Energy Report with full knowledge of Opower's intellectual property rights in the Home Energy Reports.

66. As a direct and consequential result of Defendant's unlawful conduct, Opower has suffered substantial monetary loss and harm to its business reputation and goodwill.

67. E2.0's conduct has caused and will continue to cause irreparable injury to Opower unless enjoined by this Court. Opower has no adequate remedy at law.

68. As a direct and consequential result of E2.0's willful and intentional deceptive trade practices, Opower has been injured and brings this action to enjoin further violations and recover double or treble damages, and attorneys' fees and costs as permitted by the law.

### **PRAYER FOR RELIEF**

WHEREFORE, plaintiff Opower requests that this Court:

A. Declare that E2.0 has infringed Opower's copyrights in the Registered Reports;

B. Declare that E2.0 has willfully infringed Opower's copyrights in the Registered Reports;

C. Preliminarily and permanently enjoin E2.0, its agents, employees, officers, directors, attorneys, successors, affiliates, subsidiaries and assigns, and all those acting in concert or participation with E2.0, from

(a) directly or indirectly infringing, in any manner, Opower's copyrights, or from inducing, aiding, causing, or materially contributing to any such infringement;

(b) producing, distributing, displaying, advertising, or promoting the Accused Reports or any other work that infringes Opower's copyrights, intellectual property rights, or any work substantially similar thereto or derived therefrom;

(c) engaging in any other activity constituting unfair competition with Opower, or constituting an infringement of Opower's rights; and

(d) aiding, assisting, or abetting any other party in doing any act prohibited by the above paragraphs.

D. Direct that E2.0 deliver for destruction all Accused Reports in its possession, or under its control, or any other materials incorporating the Registered Reports or a colorable imitation thereof.

E. Direct that E2.0 file with the Court and serve upon Opower's counsel within thirty (30) days after entry of such judgment, a report in writing under oath, setting forth in detail the manner and form in which E2.0 has complied therewith.

F. Award Opower such damages as it has sustained or will sustain by reason of E2.0's copyright infringement, or, in lieu thereof, should Opower elect, statutory damages in an amount not less than \$150,000 for each infringement, or for such other amount as may be proper pursuant to 17 U.S.C. § 504(c); and/or from E2.0's unfair competition, and unfair trade practices; and pursuant to 15 U.S.C. § 1117 and MGL ch 93A awarding Opower an amount up to three times the amount of the actual damages sustained as a result of E2.0's violation of the Lanham Act and MGL ch 93A.

G. Order E2.0 to account for and pay over to Opower all gains, profits, property and advantages derived by E2.0 by reason of E2.0's copyright infringement, unfair competition, and unfair trade practices;

H. Award Opower such enhanced, exemplary and/or punitive damages as the court finds appropriate for E2.0's willful and intentional misconduct;

I. Award Opower's costs and disbursements incurred in this action, including reasonable attorney's fees, pursuant to 17 U.S.C. § 505, 15 U.S.C. § 1117 and MGL ch 93A;

J. Award Opower prejudgment interest according to law;

K. Award Opower other and further relief as this Court may deem just and proper.

#### Demand for Jury Trial

Pursuant to Federal Rule of Civil Procedure 38, Opower hereby demands a jury trial of any issues in this action so triable.

Dated: November 14, 2011

Respectfully submitted,

OPOWER, INC.

By Its Attorneys,

/s/Peter J. Karol/

Jack C. Schechter (BBO# 652349)

Peter J. Karol (BBO# 660338)

Nicole Rizzo Smith (BBO# 663853)

SUNSTEIN KANN MURPHY &

TIMBERS LLP

125 Summer Street

Boston, Massachusetts 02110

Telephone: 617-443-9292

Facsimile: 617-443-0004

[jschechter@sunsteinlaw.com](mailto:jschechter@sunsteinlaw.com)

[pkarol@sunsteinlaw.com](mailto:pkarol@sunsteinlaw.com)

[nsmith@sunsteinlaw.com](mailto:nsmith@sunsteinlaw.com)

03527/00506 1540492