

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)
)
CERTAIN ENERGY DRINK PRODUCTS) Investigation No. 337-TA-678
)
)

Order No. 8: Granting Motion No. 678-2 To Modify The Protective Order

On July 17, 2009, complainants Red Bull GmbH and Red Bull North America, Inc. moved to modify the Protective Order (Order No.2) to address the inadvertent disclosure of documents and things subject to the attorney-client privilege or work product immunity with the addition of the following claw-back provision:

Inadvertent production of a document or thing subject to work product immunity or the attorney-client privilege shall not constitute a waiver of the immunity or privilege. In the event that the receiving party discovers that it has received either attorney-client privilege or work-product protected documents, it shall bring that fact to the attention of the producing party immediately upon that discovery. Upon the written request of the producing party, the receiving party shall return such inadvertently produced materials and destroy all copies thereof within five (5) days of receipt of written request from the producing party. If the receiving party disclosed the inadvertently produced materials before receiving notice of the inadvertent production, it shall take reasonable steps after receiving such notice to retrieve the inadvertently produced materials. This provision shall not preclude the receiving party, after having returned inadvertently produced materials, from seeking discovery of such materials or challenging any asserted immunity or privilege, in accordance with the USITC's rules of practice and procedure and relevant law, on a basis other than asserted waiver due to inadvertent production.

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OFFICE OF THE SECRETARY
U.S. INTERNATIONAL TRADE COMMISSION

(Motion Docket No. 678-2.)

Respondent India Imports, Inc., respondent Washington Food and Supply of D.C., Inc. and respondent Vending Plus, Inc. in a response dated July 26, 2009, opposed the pending

motion.

The staff, at the preliminary conference, indicated that it would not take a position on the pending motion.

No other party responded to the pending motion.


It is a fact that this administrative law judge has included a provision similar to the proposed provision in protective orders in previous investigations. See, e.g., Certain Short-Wavelength Light Emitting Diodes, Laser Diodes and Products Containing Same (Inv. No. 337-TA-640); and Certain Liquid Crystal Display Devices and Products Containing the Same (Inv. No. 337-TA-631). However, in each investigation where such a provision has been included, there was no opposition to its inclusion from any party. Opposing respondents argued that under the proposed claw-back provision parties would be accorded impunity from the consequences of their actions in failing to guard these privileges with the requisite care; that the proposed provision treats these privileges lightly and encourages a lack of diligence by immunizing a party that fails to take the steps necessary to preserve them against waiver; that at its worst, the proposed provision could serve to immunize the most egregious types of discovery abuses;¹ that it is, in short, a license for a lack of proper attention to preserving the privileges and, potentially, for abuse of the discovery process and the privileges themselves; and that the proposed claw-back provision is, moreover, a rule that confers the greatest benefits on the party with the largest number of documents to produce, viz. complainants.

¹ Said respondents cited Certain Nitrile Gloves, Invs. Nos. 337-TA-608 and 612, ALJ Order No. 31 (Oct. 9, 2007) (where complainant responded to respondent's discovery requests by placing at his disposal 1,000 boxes of documents that complainant had not reviewed for privilege, the administrative law judge held that "none of the documents in the 1,000 boxes will be deemed privileged for this investigation").

It is not denied that the proposed claw-back provision is standard in protective orders for cases being tried in federal district courts and in section 337 investigations. Complainants have further represented that they have undertaken a privilege review prior to the production of their documents in this proceeding. Moreover, as complainant argued any party could move to amend the protective order or seek other intervention in the event it believed another party was abusing the claw back provision.

Based on the foregoing, Motion No. 678-2 is granted as of the issuance date of this order with the proviso that lead counsel of a party producing any documents furnish any party requesting documents a sworn declaration prior to production that the party producing said documents has conducted a privilege review prior to said production.

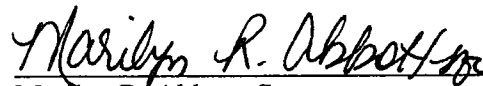
The administrative law judge is requesting that this order be served by overnight delivery.


Paul J. Luckern
Chief Administrative Law Judge

Issued: July 28, 2009

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Order** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on July 28, 2009.



Marilyn R. Abbott, Secretary
U.S. International Trade Commission
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RESPONDENTS:

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