

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

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In the Matter of)
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CERTAIN ENERGY DRINK PRODUCTS) Investigation No. 337-TA-678
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Order No. 11: Initial Determination Granting Complainants' Motion No. 678-9 To Amend The Complaint And Notice Of Investigation to Add Six Additional Respondents

On August 25, 2009, complainants Red Bull GmbH and Red Bull North America (Red Bull) filed a motion to amend the complaint and notice of investigation to add six new respondents, viz. Posh Nosh Imports (USA) (Posh Nosh), Greenwich, Inc. (Greenwich), Advantage Food Distributors, Ltd. (Advantage), Wheeler Trading, Inc. (Wheeler), Avalon International General Trading, LLC (Avalon), and Central Supply, Inc. (Central). (Motion Docket No. 678-9.)

The staff, in a response dated September 1, 2009, argued that Motion No. 678-9 to add the six new respondents should be granted and that the discovery cut-off date should be extended by a reasonable time.

In a filing dated September 1, 2009, proposed respondent Central opposed Motion No. 678-9.

Complainants Red Bull, in a filing dated September 4, 2009, moved for leave to file a reply to Central's opposition to correct "inaccurate" statements of law, to create a more complete record and to ensure that all issues are fully briefed. (Motion Docket No. 678-10.) It was represented that the staff did not oppose said motion and that counsel in his capacity representing the "current respondents" indicated that the current respondents neither support nor oppose said

motion. Motion No. 678-10 is granted.

In a filing dated August 31, 2009, proposed respondent Wheeler did not object to Motion No. 678-9 but reserved all rights to contest the relief sought in the amended complaint if Wheeler is added as a respondent.

No other party responded to Motion No. 678-9.

Commission rule 210.14(b) governs amendments to the complaint and notice of investigation after institution of an investigation and provides in relevant part:

(b) Postinstitution amendments generally.

(1) After an investigation has been instituted, the complaint or notice of investigation may be amended only by leave of the Commission for good cause shown and upon such conditions as are necessary to avoid prejudicing the public interest and the rights of the parties to the investigation.

After an investigation has been instituted, a complainant who seeks to amend the complaint and notice of investigation bears the burden of establishing the existence of good cause to make the requested amendment. Certain EPROM, EEPROM, Flash Memory, and Flash Microcontroller Semiconductor Devices and Products Containing Same, Inv. No. 337-TA-395, Order No. 18 (August 27, 1997) at 2 (EEPROMs). In addition, there must be an inquiry into whether granting the motion would prejudice the rights of the other parties and the public interest. Id.

Motions to amend the complaint to add new respondents have been granted when the complainant demonstrates that new information was obtained that was not known to the complainant prior to institution. Certain Laminated Floor Panels, Inv. No. 337-TA-545, Order No. 4 at 2 (Sept. 19, 2005) (Floor Panels); and Certain Rare-Earth Magnets and Magnetic Materials and Articles Containing the Same, Inv. No. 337-TA-413, Order No. 21 at 5 (Dec. 10,

1998) (Magnets). Motions to amend the complaint to add respondents have also been granted when the complainant receives information during discovery that confirms information available to the complainant prior to institution. See, e.g., Certain Display Controllers and Products Containing Same, Inv. No. 337-TA-491, Order No. 5, 2003 WL 21479993 (June 20, 2003). Additionally, “good cause” to add a party as a respondent has been found, e.g., when the party has, inter alia, information that is relevant to the investigation, which is necessary in developing a complete record. Certain Zero-Mercury-Added Alkaline Batteries, Parts Thereof, and Products Containing Same, Inv. No. 337-TA-493, Order No. 17 at 4.

The administrative law judge finds that good cause has been shown for the addition of all six proposed new respondents, i.e., Posh Nosh, Greenwich, Advantage, Wheeler, Avalon, and Central at this time. Thus, Red Bull obtained information subsequent to the filing of its complaint that either confirmed its suspicions that one or more of the proposed respondents was engaged in the exportation, importation, or sale after importation of the accused gray market energy drinks. (Red Bull Memo at 2.) Hence, each of the proposed respondents is accused of infringement based on its exportation of the accused grey market goods to the United States, importation of such products into the United States, or its sale of such products in the United States after importation. (Red Bull Memo at 11-12.)

Central, in its opposition, argued that Red Bull’s decision not to name Central in the original complaint was not mandated by the Commission’s rules but rather by tactical considerations, considerations presumably related to Red Bull’s initial decision to name only a limited number of respondents, all small entities at the bottom of the distribution chain, in the hope that all would default without mounting a defense and that this apparent attempt to game

the Commission's procedures should not be countenanced. (Opp. at 5). Reference however is made to the declaration of Anna Kurian Shaw at ¶¶ 2, 3. (Appendix 5 to Motion No. 678-9).

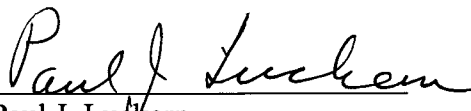
The staff did argue that discovery is currently scheduled to be completed on October 23, 2009, citing Order No. 6, July 16, 2009; that assuming that the proposed respondents do not obtain an extension of time within which to respond to Motion No. 678-9, responses to said motion are due on September 1, 2009; that thus even if Motion No. 678-9 were to be granted almost immediately, the earliest date that the proposed respondents could be added to the investigation would occur in early October 2009, assuming non-review of the ID by the Commission; and that hence responses to the amended complaint and amended notice of investigation would be due in mid October 2009. Hence, the staff argued that the proposed respondents would be prejudiced if they are added to the investigation without an extension of the discovery cut-off date, at a minimum. Thus, the staff's support of Red Bull's motion was conditioned on an extension of the discovery cut-off date with respect to the newly added respondents by a reasonable amount of time. The staff noted that it does not recommend extension of any of the other dates of the procedural schedule at this time because the newly added respondents may default; and that in the event that any of such entities intends to participate in this investigation, such entity could move for an extension of the target date or other deadlines. However proposed respondent Central in its opposition argued that under the present procedural schedule "the domestic and foreign respondents will be absolutely precluded from propounding discovery requests in support of their defense."

The administrative law judge finds, based on present record, that granting Motion No. 678-9 would not prejudice the rights of the other parties presently in the investigation nor the

public interest. However, he agrees with the staff and proposed respondent Central to the extent that certain procedural dates with respect to only the newly added respondents should be extended. Hence, by this order the administrative law judge also is extending the fact discovery request cut-off date from October 9, 2009, as set out in Order No. 6, to November 9, 2009 and the fact discovery completion date from October 23, 2009, as set out in Order No. 6 to November 23, 2009.

Based on the foregoing, Motion No. 678-9 is granted.

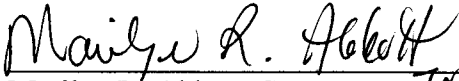
This initial determination, pursuant to Commission rule 210.42(c), is hereby CERTIFIED to the Commission. Pursuant to Commission rule 210.42(h)(3), this initial determination shall become the determination of the Commission within thirty (30) days after the date of service hereof unless the Commission grants a petition for review of this initial determination pursuant to Commission rule 210.43, or orders on its own motion a review of the initial determination or certain issues therein pursuant to Commission rule 210.44.


Paul J. Luckern
Chief Administrative Law Judge

Issued: September 8, 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 September 9, 2009.


Marilyn R. Abbott, Secretary *JAC*
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