

PUBLIC VERSION

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the Matter of)

CERTAIN ENERGY DRINK PRODUCTS)

Investigation No. 337-TA-678

Order No. 9: Relating To Motion No. 678-4 Pertaining To Settlement Conference

On July 27, 2009, respondents India Imports, Inc., d/b/a International Wholesale Club and Washington Food and Supply of D.C., Inc., d/b/a Washington Cash & Carry moved that the administrative law judge, pursuant to his authority under the Administrative Procedure Act,

- Order Complainants to attend a mandatory settlement conference, presided over by the Administrative Law Judge, with each of the moving Respondents;
- Require the attendance at such conferences of at least one representative of each party who has authority to negotiate concerning resolution of issues in controversy;
- Require that, five days prior to the settlement conference, each party serve on the opposing party, on the ALJ, and on the Staff Investigative Attorney, a settlement statement setting forth the terms and conditions upon which the party would agree to settle the case and identifying the party's representative(s) who will be attending the settlement conference with authority to settle the case. (Motion Docket No. 678-4.)

The staff, in a response dated August 3, 2009, opposed Motion No. 678-4 although it was represented that should the administrative law judge feel this investigation would benefit from an early settlement conference, the staff stands ready to offer any assistance it can.

Complainants, in a response dated August 3, 2009, argued that Motion No. 678-4 should be denied.

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It is a fact that the procedural schedule issued in this investigation includes three mandatory settlement conferences between the parties, the first of which must be concluded prior to August 29, 2009, the date for the parties to serve the first settlement conference report. Further, while not expressly stated in the scheduling order, presumably such conferences are to be attended by individuals representing each party with the authority to effectuate settlement.

Movants, in support of Motion No. 678-4, argued that complainants have refused to respond to the concrete offers for settlement proffered by respondents; that specifically, on July 7, 2009 counsel for respondents responded to a settlement letter from complainants' counsel in which respondents made a specific response to each point raised in the letter, provided the information necessary to calculate a settlement amount based on respondents' respective sales of the allegedly infringing products, and made a specific monetary offer of settlement; that despite repeated requests from respondents' counsel for an answer to its July 7, 2009 counter-offer, complainants' counsel has declined to respond, merely repeated that he is "awaiting word from his client;" and that in the meantime, respondents continue to incur litigation costs imposed by a large, well-funded adversary with little apparent motivation to settle this matter. Complainants, in their opposition, acknowledged a July 7, 2009 contact with counsel for movants stating:

On July 7, the parties had a telephone call regarding settlement during which counsel for Respondents, among other things, made monetary offers for settlement on behalf of each Respondent. Respondents, however, in Complainants' view, did not provide enough information for Complainants to give adequate consideration to such offers. Although such information has been requested by Complainants in discovery requests, the parties are continuing discussions regarding these offers and exchanging the information necessary (through discovery as well as their ongoing

discussions) for Complainants to consider such offers fully.

Fact gathering and exchange are critical steps in advancing settlement discussions. Without obtaining further information regarding the scope of Respondents' activities, Complainants cannot advance meaningful settlement discussions, particularly where, as here, any settlement would also include resolution of a pending district court case where additional issues are involved.

As indicated in the preliminary conference, the administrative law judge favors settlements of investigations and in fact has participated in settlement discussions in past investigations in which he has presided over.¹ There is ample authority for the administrative law judge to participate in said settlement discussions. In addition to the authority from the Administrative Procedure Act cited by movants, case law supports the view that a presiding judge may participate in settlement conferences. Thus “[i]t is well established and appropriate for judges to meet with counsel and parties in connection with settlement negotiations.” Bilello v. Abbott Labs., 825 F.Supp. 475, 479 (E.D.N.Y. 1993). Other cases are of a similar view. See In re Martinez-Catala, 129 F.3d 213, 218-20 (1st Cir. 1997); Johnson v. Trueblood, 629 F.2d 287, 291-92 (3d Cir. 1980). The administrative law judge however is mindful that there are limitations in his involvement. A judge may step over the line and become so involved in encouraging settlement that his impartiality might be questioned. See, e.g., Anderson v. Sheppard, 856 F.2d 741, 747 (6th Cir. 1988) (reversing a decision because of judge’s involvement in settlement negotiations in which the judge “had clearly determined that Anderson should settle on the terms offered by Ford”); United States v. Pfizer Inc., 560 F.2d 319, 322-23 (8th Cir. 1977) (overturning a judge’s decision to conduct a bench trial because of his participation, “to an

¹ The administrative law judge at the preliminary conference also made reference to the ITC pilot mediation process which was put in effect for settlement of section 337 investigations.

extraordinary degree,” in settlement negotiations). Hence, the active encouragement of settlement by a judge who is a finder of fact can easily slip over the line into coercing a settlement, which has been universally condemned. See, e.g., Goss Graphics Sys., Inc. v. DEV Indust., Inc., 267 F.3d 624, 627 (7th Cir. 2001) (“Federal courts do have authority to require parties to engage in settlement negotiations, but they have no authority to force a settlement.”) (citations omitted); Newton v. A.C. & S., Inc., 918 F.2d 1121, 1128 (3d Cir. 1990) (“[T]he court should never work to coerce or compel a litigant to make a settlement.”) (quoting Del Rio v. Northern Blower Co., 574 F.2d 23, 26 (1st Cir. 1978)); Kothe v. Smith, 771 F.2d 667, 668-69 (2d Cir. 1985) (“Although the law favors the voluntary settlement of civil suits, it does not sanction efforts by trial judges to effect settlement through coercion.”)

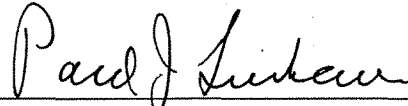
It is a fact that ground rule 15 states that the administrative law judge may order the parties to appear at the ITC for settlement discussions after the pre-hearing statements are filed. However, ground rule 15 does not limit said settlement discussions only to after the pre-hearing statements are filed. Nevertheless based on this administrative law judge’s numerous participating in settlement discussions in prior investigations, he believes exchange of information thru some discovery is helpful prior to any settlement discussions in the presence of the administrative law judge. While movants make reference to a specific response to a settlement letter from complainants’ counsel, it is unclear where the investigation stands with respect to discovery as it pertains to movants.

It is a fact that there is a mandatory settlement conference scheduled prior to August 29, 2009, the date for the parties to serve the first settlement conference report(s). Presumably said report(s) will indicate the status of discovery. Hence at least until review of the first settlement

report(s), the administrative law judge is not ordering a mandatory settlement conference in the presence of the administrative law judge.

Based on the foregoing, Motion No. 678-4 is denied.

This order will be made public unless a bracketed confidential version is received no later than the close of business on August 21, 2009

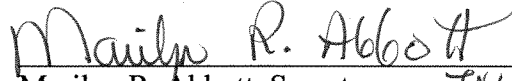


Paul J. Luckern
Chief Administrative Law Judge

Issued: August 7, 2009

PUBLIC CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **Public Version Order** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on November 16, 2009.


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