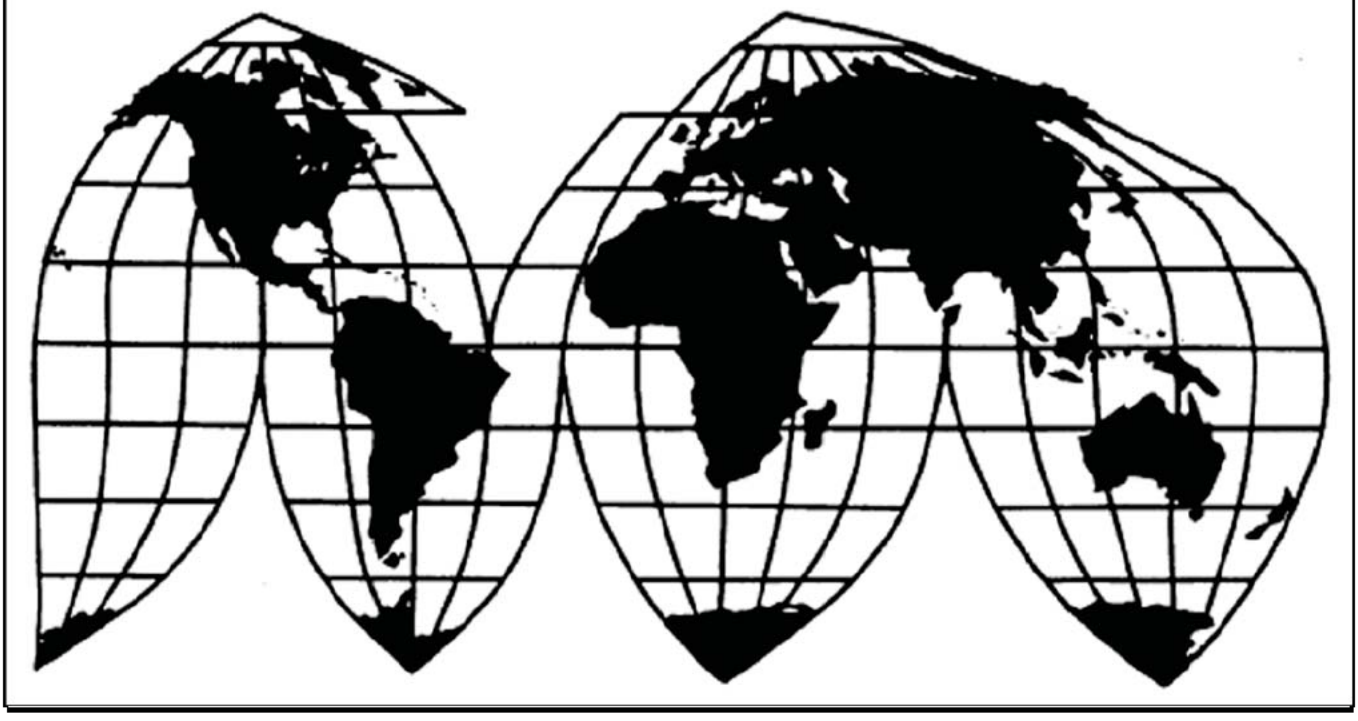
In the Matter of

Certain Energy Drink Products

Investigation No. 337-TA-678

Publication 4286 **November 2011**

U.S. International Trade Commission



Washington, DC 20436

U.S. International Trade Commission

COMMISSIONERS

Deanna Tanner Okun, Chairman
Irving A. Williamson, Vice Chairman
Charlotte R. Lane
Daniel R. Pearson
Shara L. Aranoff
Dean A. Pinkert

Address all communications to
Secretary to the Commission
United States International Trade Commission
Washington, DC 20436

U.S. International Trade Commission

Washington, DC 20436
www.usitc.gov

In the Matter of

Certain Energy Drink Products

Investigation No. 337-TA-678

Publication 4286

November 2011

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

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

NOTICE OF ISSUANCE OF A CORRECTED GENERAL EXCLUSION ORDER

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined to revise the general exclusion order issued in the subject investigation on September 8, 2010.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-708-3747. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: This trademark and copyright-based investigation was instituted by the Commission on June 17, 2009, based on a complaint filed by Red Bull GmbH of Fuschl am See, Austria, and Red Bull North America, Inc. of Santa Monica, California (collectively, "Red Bull"). 74 *Fed. Reg.* 28725 (Jun. 17, 2009). The respondents named in the notice of investigation were: Chicago Import Inc. of Chicago, Illinois; Lamont Distr., Inc., a/k/a Lamont Distributors Inc., of Brooklyn, New York; India Imports, Inc., a/k/a International Wholesale Club, of Metairie, Louisiana; Washington Food and Supply of D.C., Inc., a/k/a Washington Cash & Carry, of Washington, D.C.; Vending Plus, Inc. d/b/a Baltimore Beverage Co., of Glen Burnie, Maryland; Posh Nosh Imports (USA), Inc. of South Kearny, New Jersey ("Posh Nosh"); Greenwich, Inc. of Florham Park, New Jersey; Advantage Food Distributors Ltd. of Suffolk, UK; Wheeler Trading, Inc. of Miramar, Florida; Avalon International General Trading, LLC of Dubai, United Arab Emirates; and Central Supply, Inc. of Brooklyn, New York. The asserted trademarks are U.S. Trademark Reg. Nos. 3,092,197; 2,946,045; 2,994,429; and 3,479,607. The asserted copyright is U.S. Copyright Registration No. VA0001410959.

On September 8, 2010, the Commission issued a general exclusion order directed to U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; and 3,479,607 and U.S. Copyright Registration No. VA0001410959. The Commission has determined to issue a corrected general exclusion order to more closely conform to the Commission's determination.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.49-50 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.49-50.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: October 1, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C. 20436

In the matter of **CERTAIN ENERGY DRINK PRODUCTS**	**Inv. No. 337-TA-678**

CORRECTED GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) based on the unlawful importation and sale of certain energy drink products that infringe (1) U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or (2) U.S. Copyright Registration No. VA0001410959.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing energy drink products.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

Accordingly, the Commission hereby **ORDERS** that:

1. Energy drink products that (i) infringe U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or any marks confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear U.S. Copyright Registration No. VA0001410959 or a design substantially similar thereto are excluded from entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from warehouse for consumption, except if imported by, or licensed from, or with the permission of the trademark and copyright owner or as provided by law, until such date as the trademarks and copyright are abandoned, cancelled, or rendered invalid or unenforceable.

2. For the purpose of assisting U.S. Customs and Border Protection in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order a copy of the relevant trademark registrations as Exhibit 1 and a copy of the relevant copyright as Exhibit 2.

3. Notwithstanding paragraph 1 of this Order, the aforesaid energy drink products are entitled to entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of the entered value of the products pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)), and the Presidential memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251 (Jul. 21, 2005)) from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than 60 days after the date of receipt of this Order. Note, however, this provision does not exempt infringing articles from seizures under the trademark

laws enforced by Customs and Border Protection, most notably 19 U.S.C. § 1526(e) and 19 U.S.C. § 1595a(c)(2)(C) in connection with 15 U.S.C. § 1124.

4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to energy drink products that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

5. Complainants Red Bull GmbH and Red Bull North America, Inc. shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Red Bull GmbH and Red Bull North America, Inc. continues to use each of the aforesaid trademarks and copyright in commerce in the United States in connection with energy drink products, whether any of the aforesaid trademarks or copyright has been abandoned, canceled, or rendered invalid or unenforceable, and whether Complainants continue to satisfy the economic requirements of Section 337(a)(2).

6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

7. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs and Border Protection.

8. At the discretion of U.S. Customs and Border Protection and pursuant to procedures it establishes, persons seeking to import energy drink products that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under this Order. At its discretion, U.S. Customs and Border Protection may require persons who have provided the

certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

9. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: October 1, 2010

CERTAIN ENERGY DRINK PRODUCTS **337-TA-678**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF ISSUANCE OF A CORRECTED GENERAL EXCLUSION ORDER** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on October 1, 2010.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Red Bull GmbH and Red Bull North America, Inc.:

Raymond A. Kurz, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

GOVERNMENT AGENCIES:

Edward T. Hand, Chief
Foreign Commerce Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW – Room 11000
Washington, DC 20530

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

U.S. Bureau of Customs and Border Protection
Intellectual Property Rights Branch
Mint Annex Building
799 9th Street, NW -7th floor
Washington, DC 20229-1177

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Elizabeth Kraus, Deputy Director
International Antitrust, Office of
International Affairs
Federal Trade Commission
600 Pennsylvania Avenue, Room 498
Washington, DC 20580

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Richard Lambert, Esq.
Office of Technology Development Services
Dept. of Health & Human Services
National Institutes of Health
6610 Rockledge Drive - Room 2800, MSC 6606
Bethesda, MD 20892

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

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

NOTICE OF ISSUANCE OF A GENERAL EXCLUSION; TERMINATION OF THE INVESTIGATION

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has issued a general exclusion order in the above-captioned investigation and has terminated the investigation.

FOR FURTHER INFORMATION CONTACT: Jia Chen, Esq., Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-708-3747. Copies of all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: This trademark and copyright-based investigation was instituted by the Commission on June 17, 2009, based on a complaint filed by Red Bull GmbH of Fuschl am See, Austria, and Red Bull North America, Inc. of Santa Monica, California (collectively, "Red Bull"). 74 *Fed. Reg.* 28725 (Jun. 17, 2009). The respondents named in the notice of investigation were: Chicago Import Inc. of Chicago, Illinois ("Chicago Import"); Lamont Distr., Inc., a/k/a Lamont Distributors Inc., of Brooklyn, New York ("Lamont"); India Imports, Inc., a/k/a International Wholesale Club, of Metairie, Louisiana ("India Imports"); Washington Food and Supply of D.C., Inc., a/k/a Washington Cash & Carry, of Washington, D.C. ("Washington Food"); Vending Plus, Inc. d/b/a Baltimore Beverage Co., of Glen Burnie, Maryland ("Vending Plus"); Posh Nosh Imports (USA), Inc. of South Kearny, New Jersey ("Posh Nosh"); Greenwich, Inc. of Florham Park, New Jersey ("Greenwich"); Advantage Food Distributors Ltd. of Suffolk, UK ("Advantage Food"); Wheeler Trading, Inc. of Miramar, Florida

("Wheeler Trading"); Avalon International General Trading, LLC of Dubai, United Arab Emirates ("Avalon"); and Central Supply, Inc. of Brooklyn, New York ("Central Supply"). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. The asserted trademarks are U.S. Trademark Reg. Nos. 3,092,197; 2,946,045; 2,994,429; and 3,479,607. The asserted copyright is U.S. Copyright Registration No. VA0001410959.

On January 5, 2010, the Commission determined not to review two initial determinations ("IDs") (Order Nos. 21 and 22) finding Lamont and Avalon in default pursuant to Commission Rule 210.16. On January 28, 2010, the Commission determined not to review two additional IDs (Order Nos. 29 and 30) finding respondents Posh Nosh, Greenwich, Advantage Food, and Chicago Imports in default pursuant to Commission Rule 210.16. On February 16, 2010, the Commission determined not to review an ID (Order No. 32) finding respondent Central Supply in default pursuant to Commission Rule 210.16.

Wheeler Trading, Washington Food, India Imports, and Vending Plus were the only respondents that responded to the complaint and notice of investigation. On January 20, 2010, the Commission determined not to review four IDs (Order Nos. 24, 25, 26, and 27) terminating the investigation as to those respondents on the basis of settlement agreements. Thus, defaulting respondents Posh Nosh, Greenwich, Advantage Food, Chicago Imports, Avalon, Central Supply, and Lamont were the only respondents remaining in the investigation.

On December 2, 2009, Red Bull moved for summary determination on the issues of domestic industry, importation, and violation of Section 337. Pursuant to Commission Rule 210.16(c)(2), 19 C.F.R. § 216(c)(2), Red Bull also stated that it was seeking a general exclusion order. On March 31, 2010, the presiding ALJ issued the subject ID, Order No. 34, granting Red Bull's motion for summary determination of violation with respect to respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import, but not with respect to Lamont. He also issued his recommendations on remedy and bonding in Order No. 34. Specifically, the ALJ recommended issuance of a general exclusion order and a bond of 100 percent. No petitions for review were filed.

On May 14, 2010, the Commission issued notice of its determination not to review the ID granting summary determination of violation in part, and requesting briefing on remedy, the public interest, and bonding. On May 28, 2010, Red Bull submitted briefing on remedy, the public interest, and bonding. Specifically, Red Bull requested a general exclusion order. The IA also submitted briefing on May 28, 2010, in support of a general exclusion order. No other submissions were received.

Having reviewed the record in this investigation, including the ALJ's recommended determination, the Commission has determined that the appropriate relief is a general exclusion order prohibiting the unlicensed entry of certain energy drink products that (i) infringe U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or any marks

confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear Red Bull's U.S. Copyright Registration No. VA0001410959 or a design confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship.

The Commission has further determined that the public interest factors listed in section 337(d)(1) do not preclude issuance of the general exclusion order. Finally, the Commission has determined that the amount of bond to permit temporary importation during the period of Presidential review shall be in the amount of 100 percent of the value of the infringing products that are subject to the general exclusion order. The Commission's order and opinion were delivered to the President and to the United states Trade Representative on the day they were issued.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. 1337, and in sections 210.49-50 of the Commission's Rules of Practice and Procedure, 19 C.F.R. §§ 210.49-50.

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: September 8, 2010

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

In the matter of	
CERTAIN ENERGY DRINK PRODUCTS	**Inv. No. 337-TA-678**

GENERAL EXCLUSION ORDER

The Commission has determined that there is a violation of section 337 of the Tariff Act of 1930 (19 U.S.C. § 1337) based on the unlawful importation and sale of certain energy drink products that infringe (1) U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or (2) U.S. Copyright Registration No. VA0001410959.

Having reviewed the record in this investigation, including the written submissions of the parties, the Commission has made its determination on the issues of remedy, the public interest, and bonding. The Commission has determined that a general exclusion from entry for consumption is necessary because there is a pattern of violation of section 337 and it is difficult to identify the source of infringing products. Accordingly, the Commission has determined to issue a general exclusion order prohibiting the unlicensed importation of infringing energy drink products.

The Commission has further determined that the public interest factors enumerated in 19 U.S.C. § 1337(d) do not preclude issuance of the general exclusion order, and that the bond during the Presidential review period shall be in the amount of 100 percent of the entered value of the articles in question.

Accordingly, the Commission hereby **ORDERS** that:

1. Energy drink products that (i) infringe U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,994,429; or 3,479,607 or any marks confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear U.S. Copyright Registration No. VA0001410959 or a design confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship are excluded from entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from warehouse for consumption, except if imported by, or licensed from, or with the permission of the trademark and copyright owner or as provided by law, until such date as the trademarks and copyright are abandoned, cancelled, or rendered invalid or unenforceable.

2. For the purpose of assisting U.S. Customs and Border Protection in the enforcement of this Order, and without in any way limiting the scope of the Order, the Commission has attached to this Order a copy of the relevant trademark registrations as Exhibit 1 and a copy of the relevant copyright as Exhibit 2.

3. Notwithstanding paragraph 1 of this Order, the aforesaid energy drink products are entitled to entry into the United States for consumption, entry for consumption from a foreign trade zone, or withdrawal from a warehouse for consumption, under bond in the amount of 100 percent of the entered value of the products pursuant to subsection (j) of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337(j)), and the Presidential memorandum for the United States Trade Representative of July 21, 2005 (70 *Fed. Reg.* 43251 (Jul. 21, 2005)) from the day after this Order is received by the United States Trade Representative until such time as the United States Trade Representative notifies the Commission that this Order is approved or disapproved but, in any event, not later than 60 days after the date of receipt of this Order. Note, however, this provision does not exempt infringing articles from seizures under the trademark

laws enforced by Customs and Border Protection, most notably 19 U.S.C. § 1526(e) and 19 U.S.C. § 1595a(c)(2)(C) in connection with 15 U.S.C. § 1124.

4. In accordance with 19 U.S.C. § 1337(l), the provisions of this Order shall not apply to energy drink products that are imported by and for the use of the United States, or imported for, and to be used for, the United States with the authorization or consent of the Government.

5. Complainants Red Bull GmbH and Red Bull North America, Inc. shall file a written statement with the Commission, made under oath, each year on the anniversary of the issuance of this Order stating whether Red Bull GmbH and Red Bull North America, Inc. continues to use each of the aforesaid trademarks and copyright in commerce in the United States in connection with energy drink products, whether any of the aforesaid trademarks or copyright has been abandoned, canceled, or rendered invalid or unenforceable, and whether Complainants continue to satisfy the economic requirements of Section 337(a)(2).

6. The Commission may modify this Order in accordance with the procedures described in section 210.76 of the Commission's Rules of Practice and Procedure (19 C.F.R. § 210.76).

7. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs and Border Protection.

8. At the discretion of U.S. Customs and Border Protection and pursuant to procedures it establishes, persons seeking to import energy drink products that are potentially subject to this Order may be required to certify that they are familiar with the terms of this Order, that they have made appropriate inquiry, and thereupon state that, to the best of their knowledge and belief, the products being imported are not excluded from entry under this Order. At its discretion, U.S. Customs and Border Protection may require persons who have provided the

certification described in this paragraph to furnish such records or analyses as are necessary to substantiate the certification.

9. Notice of this Order shall be published in the *Federal Register*.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: September 8, 2010

CERTAIN ENERGY DRINK PRODUCTS **337-TA-678**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF ISSUANCE OF GENERAL EXCLUSION: TERMINATION OF THE INVESTIGATION** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on September 8, 2010.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Red Bull GmbH and Red Bull North America, Inc.:

Raymond A. Kurz, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

GOVERNMENT AGENCIES:

Edward T. Hand, Chief
Foreign Commerce Section
Antitrust Division
U.S. Department of Justice
450 5th Street NW – Room 11000
Washington, DC 20530

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

U.S. Bureau of Customs and Border Protection
Intellectual Property Rights Branch
Mint Annex Building
799 9th Street, NW -7th floor
Washington, DC 20229-1177

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Elizabeth Kraus, Deputy Director
International Antitrust, Office of
International Affairs
Federal Trade Commission
600 Pennsylvania Avenue, Room 498
Washington, DC 20580

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

Richard Lambert, Esq.
Office of Technology Development Services
Dept. of Health & Human Services
National Institutes of Health
6610 Rockledge Drive - Room 2800, MSC 6606
Bethesda, MD 20892

( ) Via Hand Delivery
( ) Via Overnight Mail
(✓) Via First Class Mail
( ) Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C.

In the matter of CERTAIN ENERGY DRINK PRODUCTS	Inv. No. 337-TA-678

COMMISSION OPINION ON REMEDY, THE PUBLIC INTEREST, AND BONDING

On March 31, 2010, the presiding administrative law judge ("ALJ") issued an initial determination ("ID"), Order No. 34, finding a violation of section 337 of the Tariff Act of 1930, 19 U.S.C. § 1337 ("Section 337") based on substantial, reliable, and probative evidence by several defaulting respondents in this investigation. In Order No. 34, the ALJ also issued his recommendations on remedy, the public interest, and bonding ("RD"). Specifically, the ALJ recommended issuance of a general exclusion order based on his determination that Section 337(d)(2)(B) has been met and a bond of 100 percent. On May 14, 2010, the Commission determined not to review the ID granting summary determination on violation, and requested briefing on remedy, the public interest, and bonding. On September 8, 2010, the Commission issued a notice and a general exclusion order and terminated the investigation. The following opinion sets forth the reasons for the Commission's determination with respect to remedy, the public interest, and bonding.

I. BACKGROUND

The Commission instituted this trademark and copyright-based investigation on June 17, 2009 pursuant to Section 337, based on a complaint filed by Red Bull GmbH of Fuschl am See, Austria, and Red Bull North America, Inc. of Santa Monica, California (collectively, "Red

Bull"). 74 *Fed. Reg.* 28725 (Jun. 17, 2009). The respondents named in the amended notice of investigation were: Chicago Import Inc. of Chicago, Illinois ("Chicago Import"); Lamont Distr., Inc., a/k/a Lamont Distributors Inc., of Brooklyn, New York ("Lamont"); India Imports, Inc., a/k/a International Wholesale Club, of Metairie, Louisiana ("India Imports"); Washington Food and Supply of D.C., Inc., a/k/a Washington Cash & Carry, of Washington, D.C. ("Washington Food"); Vending Plus, Inc., d/b/a Baltimore Beverage Co., of Burnie, Maryland ("Vending Plus"); Posh Nosh Imports (USA), Inc. of South Kearny, New Jersey ("Posh Nosh"); Greenwich, Inc. of Florham Park, New Jersey ("Greenwich"); Advantage Food Distributors Ltd. of Suffolk, UK ("Advantage Food"); Wheeler Trading, Inc. of Miramar, Florida ("Wheeler Trading"); Avalon International General Trading, LLC of Dubai, United Arab Emirates ("Avalon"); and Central Supply, Inc. of Brooklyn, New York ("Central Supply"). The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of Section 337. The asserted trademarks are United States Trademark Registration Nos. 3,092,197, 2,946,045, 2,994,429, and 3,479,607 ("Red Bull Registered Trademarks"). The asserted copyright is U.S. Copyright Registration No. VA0001410959 ("Red Bull Registered Copyright").

On January 5, 2010, the Commission determined not to review two IDs (Order Nos. 21 and 22) finding Lamont and Avalon in default pursuant to Commission Rule 210.16. On January 28, 2010, the Commission determined not to review two IDs (Order Nos. 29 and 30) finding respondents Posh Nosh, Greenwich, Advantage Food, and Chicago Imports in default pursuant to Commission Rule 210.16. On February 16, 2010, the Commission determined not to review an ID (Order No. 32) finding respondent Central Supply in default pursuant to Commission Rule 210.16. Wheeler Trading, Washington Food, India Imports, and Vending Plus were the only respondents that responded to the complaint and notice of investigation. On January 20, 2010,

the Commission determined not to review four IDs (Order Nos. 24, 25, 26, and 27) terminating the investigation as to those respondents on the basis of settlement agreements. Thus, defaulting respondents Posh Nosh, Greenwich, Advantage Food, Chicago Imports, Avalon, Central Supply, and Lamont were the only respondents remaining in the investigation.

On December 2, 2009, Red Bull moved for summary determination on the issues of domestic industry, importation, and violation of Section 337. Pursuant to Commission Rule 210.16(c)(2), 19 C.F.R. § 216(c)(2), Red Bull also stated that it was seeking a general exclusion order. On December 23, 2009, the Commission investigative attorney ("IA") submitted a response in support of a finding that a domestic industry exists and that Section 337 has been violated by defaulting respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import, but not by defaulting respondent Lamont. On January 13, 2010, and again on March 10, 2010, Red Bull filed without objection supplemental declarations and attachments to its motion for summary determination.

On March 31, 2010, the ALJ issued the subject ID, Order No. 34, granting Red Bull's motion for summary determination of violation with respect to respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import, but not with respect to Lamont. He also issued his recommendations on remedy, the public interest, and bonding in Order No. 34. Specifically, the ALJ recommended issuance of a general exclusion order and a bond of 100 percent. No petitions of for review of this ID were filed.

On May 14, 2010, the Commission issued notice of its determination not to review the ID granting summary determination of violation in part, and requested briefing on remedy, the public interest, and bonding. On May 28, 2010, Red Bull submitted briefing on remedy, the public interest, and bonding. Specifically, Red Bull requested a general exclusion order. The IA

also submitted briefing on May 28, 2010, in support of a general exclusion order. No other submissions were received.

II. DISCUSSION

A. Remedy

The Commission is authorized to issue a limited exclusion order excluding the goods of the person(s) found in violation, or, if certain criteria are met, the Commission may issue a general exclusion order excluding all infringing goods regardless of the source. The Commission's authority to issue a general exclusion order in this investigation is found in Section 337(d)(2), which provides:

> The authority of the Commission to issue an exclusion from entry of articles shall be limited to persons determined by the Commission to be violating this section unless the Commission determines that—
>
> (A) a general exclusion from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons; or
>
> (B) there is a pattern of violation of this section and it is difficult to identify the source of infringing products.

19 U.S.C. § 1337(d)(2). As emphasized by the Federal Circuit, a party must meet the "heightened requirements of Section 337(d)(2)(A) or (d)(2)(B)" before the Commission has authority to issue a general exclusion order against products of non-respondents. *Kyocera Wireless Corp. v. Int'l Trade Commission*, 545 F.3d 1340, 1537 (Fed. Cir. 2008).

The ALJ addressed the statutory requirements under Section 337(d)(2)(B) and found appropriate grounds for issuing a general exclusion order. ID/RD at 39-46. Specifically, the ALJ found that sales of certain energy drink products that infringe the Red Bull Registered Trademarks and the Red Bull Registered Copyright (collectively "Gray Market Red Bull Energy Drinks") are widespread. *Id.* at 41. For example, the ALJ observed that in the time period from

filing the complaint through discovery alone, complainants discovered numerous entities other than respondents who engaged in the importation and sale after importation of Gray Market Red Bull Energy Drinks. *Id.* The ALJ noted that respondents and other third parties have indicated that they sold Gray Market Red Bully Energy Drinks to hundreds, if not thousands, of customers who purchased, served, or sold the infringing products. *Id.* at 42. The ALJ also noted that the infringing products sold in the United States emanate from a wide array of countries, and cans of several of these Gray Market Red Bull Energy Drinks feature differences including foreign language labeling, over-labels or inkjet stamps, and different ingredients. *Id.* at 42-43. In addition, the ALJ noted that complainants have filed multiple cases in federal district courts against certain respondents in this investigation, investigated and sought discovery from numerous third parties, and sent cease-and-desist letters to and entered into negotiations with such third parties. *Id.* at 43.

The ALJ further found that it is difficult to identify the source of infringing products because companies selling Gray Market Red Bull Energy Drinks are applying over-labels that identify distributors unrelated to complainants, and also because there are extensive sales on the internet by sellers whose identities are hidden. ID/RD at 44-45. Moreover, the ALJ pointed out that Red Bull's investigations, monitoring of the marketplace, and enforcement efforts have revealed that gray market activities are widespread, opportunistic, and sporadic. *Id.* For example, the ALJ noted that that certain entities may engage in gray market activities for a short period of time and thus the window for identifying such entities is brief. *Id.* at 45. The ALJ additionally noted that there are numerous entities that engage in such activities, many of which appear to be smaller operations. *Id.* Based on these findings, the ALJ recommended the entry of

a general exclusion order directed to certain energy drink products that infringe the Red Bull Registered Trademarks and the Red Bull Registered Copyright. *Id.* at 47.

We agree with the ALJ that the factual requirements for the issuance of a general exclusion order under Section 337(d)(2)(B) have been met. With respect to the "pattern of violation," Red Bull has named eleven respondents in this investigation, has initiated multiple lawsuits in district courts against various of the respondents for infringing their trademarks and copyright, and has discovered the identities of numerous entities other than respondents who are engaged in the importation to, sale for importation, or sale after importation of Gray Market Red Bull Energy Drinks. *See* Complainants' Statement of Undisputed Material Facts ("SUMF") accompanying Complainants' Motion for Summary Determination on Violation, ¶ 241. As noted by the ALJ, complainant Red Bull North America and its authorized distributors have identified 250 suspected parties in 2009 alone who are engaged in gray market activities across the United States. ID/RD at 42; SUMF ¶¶ 212, 232-233, 238-240. In addition to the numerous entities involved in gray market activities, the Gray Market Red Bull Energy Drinks being sold in the United States emanate from a wide array of foreign countries spanning different continents. SUMF, ¶ 241. Moreover, once the infringing products are purchased, it is relatively easy and inexpensive for entities to import them into the United States. SUMF, ¶¶ 235, 253-255, 257, 258. Numerous entities are able to trade the products merely by making a posting on an online business-to-business portal or by operating a website. SUMF, ¶¶ 235, 253-254. Consequently, we agree with the ALJ that Red Bull has met its burden to establish the existence of a "pattern of violation" under the statute.

Red Bull has also met its burden to establish that "it is difficult to identify the source of infringing products." As noted by the ALJ, the gray market Red Bull Energy Drinks are being

sold extensively over the internet, including through business-to-business portals where the identities of such sellers are hidden. ID/RD at 44; SUMF, ¶¶ 235, 253-254. In addition, Red Bull's investigations, monitoring of the marketplace, and enforcement efforts have revealed that many entities engage in gray market activity for a short period of time and are smaller operations, further making it difficult to identify the infringing source. SUMF, ¶¶ 213, 231. Moreover, Red Bull often first learns of such activities after the infringing products have been offered for sale in a retail or wholesale location open to the public. SUMF, ¶ 217. At this point in the distribution channel, retailers and wholesalers are reluctant to identify the source of the infringing products. *Id.*

Based on the foregoing, we agree with the ALJ that the statutory requirements for the issuance of a general exclusion order under Section 337(d)(2)(B) has been met, and we therefore determine that the appropriate remedy in this investigation is a general exclusion order. Our general exclusion order prohibits entry into the United States energy drink products that (i) infringe the Red Bull trademarks in issue or any marks confusingly similar thereto or that are otherwise misleading as to source, origin, or sponsorship, or (ii) bear the Red Bull copyright at in issue or a design confusingly similar thereto or that are otherwise misleading as to source, origin or sponsorship.

B. The Public Interest

In determining whether to issue a general exclusion under Section 337(d)(2), the Commission must consider several factors affecting the public interest. Specifically, the Commission must consider:

> [T]he effect of such exclusion upon the public health and welfare, competitive conditions in the United States economy, and production of like or directly competitive articles in the United States, and United States consumers.

19 U.S.C. § 1337(d)(1). The public interest analysis does not concern whether there is a public interest in issuing a remedial order, but whether issuance of such an order will adversely affect the public interest. *Certain Agricultural Vehicles and Components Thereof*, Inv. No. 337-TA-487, Comm'n Op. at 17 (Dec. 2004).

The ALJ found that a general exclusion order is in the public interest, in view of the notifications received by Red Bull North America from governmental consumer protection agencies, including complaints regarding the failure of the Red Bull Gray Market Energy Drinks to comply with federal and state regulations, and in view of the fact that the infringing products are not subject to Red Bull's quality control and safety standards. ID/RD at 46.

We agree with the ALJ that the public interest favors a general exclusion order. It is undisputed that the continued importation, sale for importation into, and the sale after importation in the Untied States of Gray Market Red Bull Energy Drinks will harm Red Bull's trademarks and copyright in issue. ID/RD at 46; SUMF, ¶¶ 78-80, 85, 141, 147-164, 238-240, 259, 260. Also, as pointed out by the ALJ, Gray Market Red Bull Energy Drinks fail to comply with federal and state regulations regarding labeling and packaging, and Red Bull North America, Inc. has received complaints and notifications regarding the infringing products from various governmental consumer protection agencies and police enforcement. ID/RD at 34, 35; SUMF, ¶¶ 92-93, 142-144, 238-240. In addition, Gray Market Red Bull Energy Drinks are not subject to Red Bull's quality control and safety standards such as Red Bull's product recall procedures, and Red Bull has received numerous consumer complaints [

] SUMF, ¶¶ 96-140, 147-149, 155-164, 260. Moreover, there is no evidence that domestic demand for energy drink products cannot be met by Red Bull and its legitimate competitors, *i.e.*, manufacturers and retailers of energy drink products who do not

infringe the Red Bull Registered Trademarks and the Red Bull Registered Copyright. Thus, the record does not support a finding that issuance of a general exclusion order is precluded by consideration of the public interest factors set out in Section 337(d)(1).

C. Bond During Period of Presidential Review

During the period of Presidential review, imported articles otherwise subject to a remedial order are entitled to conditional entry under bond, pursuant to Section 337(j)(3). The amount of the bond is specified by the Commission and must be an amount "sufficient to protect the complainant from any injury." 19 U.S.C. § 1337(j)(3); 19 C.F.R. § 210.50.

The ALJ explained that, in setting the amount of the bond to be imposed during the period of Presidential review, the Commission often considers the differential in sales price between the patented product made by the domestic industry and the lower price of the infringing imported product. ID/RD at 47 (citing *Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes*, Inv. No. 337-TA-366, Comm'n Op. at 24 (Jan. 1996)). In the present investigation, the ALJ noted that each of the defaulting respondents sets its price for infringing products differently. *Id.* Thus, the ALJ concluded that a price comparison would be difficult to accurately calculate and that a bond of 100 percent is appropriate.

When there is insufficient evidence of pricing information that is not due to a failure of proof by complainants, the Commission's practice is to impose a bond of 100% of the entered value of the accused product. *Certain Neodymium-Iron-Boron Magnets, Magnet Alloys, and Products Containing Same*, Inv. No. 337-TA-372, Commission Op. on Remedy, the Public Interest, and Bonding at 15 (May 1996). Because the defaulting respondents have failed to participate in discovery and because each sets its price differently, it is impossible to calculate a bond based upon a set price differential. Accordingly, we have set the bond at 100 percent of the

entered value of the Gray Market Red Bull Energy Drinks to prevent any harm to Red Bull during the period of Presidential review.

By Order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: September 8, 2010

CERTAIN ENERGY DRINK PRODUCTS **337-TA-678**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **COMMISSION OPINION ON REMEDY, THE PUBLIC INTEREST, AND BONDING** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on November 23, 2010.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Red Bull GmbH and Red Bull North America, Inc.:

Raymond A. Kurz, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

( ) Via Hand Delivery
(✓) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

UNITED STATES INTERNATIONAL TRADE COMMISSION
Washington, D.C. 20436

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

NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION OF VIOLATION OF SECTION 337; SCHEDULE FOR SUBMISSIONS ON REMEDY, PUBLIC INTEREST, AND BONDING

AGENCY: U.S. International Trade Commission.

ACTION: Notice.

SUMMARY: Notice is hereby given that the U.S. International Trade Commission has determined not to review a final initial determination ("final ID") (Order No. 34) issued by the presiding administrative law judge ("ALJ") finding a violation of Section 337 of the Tariff Act of 1930, as amended ("section 337") in the above-identified investigation .

FOR FURTHER INFORMATION CONTACT: James A. Worth, Office of the General Counsel, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-3065. Copies of the public version of the ID and all nonconfidential documents filed in connection with this investigation are or will be available for inspection during official business hours (8:45 a.m. to 5:15 p.m.) in the Office of the Secretary, U.S. International Trade Commission, 500 E Street, S.W., Washington, D.C. 20436, telephone 202-205-2000. Hearing-impaired persons are advised that information on this matter can be obtained by contacting the Commission's TDD terminal on 202-205-1810. General information concerning the Commission may also be obtained by accessing its Internet server (*http://www.usitc.gov*). The public record for this investigation may be viewed on the Commission's electronic docket (EDIS) at *http://edis.usitc.gov*.

SUPPLEMENTARY INFORMATION: On June 17, 2009, the Commission instituted this investigation, based on a complaint filed by Red Bull GmbH of Fuschl am See, Austria, and Red Bull North America of Santa Monica, California (collectively, "Red Bull") filed on May 15, 2009, and supplemented on June 1, 2009. The respondents named in the notice of investigation were: Chicago Import Inc., of Chicago, Illinois ("Chicago Import"); Lamont Distr., Inc., a/k/a Lamont Distributors Inc., of Brooklyn, New York ("Lamont"); India Imports, Inc., a/k/a International Wholesale Club of Metairie, Louisiana ("India Imports"); Washington Food and Supply of D.C., Inc., a/k/a Washington Cash & Carry of Washington, D.C ("Washington Food"); Vending Plus, Inc., of Glen Burnie, Maryland; and Baltimore Beverage Co., Glen Burnie, Maryland. The complaint alleged violations of Section 337 of the Tariff Act of 1930, as amended, by reason of the importation, the sale for importation, or the sale after importation, of

certain energy drink products that infringe U.S. Trademark Registration Nos. 3,092,197; 2,946,045; 2,2994,429; 3,479,607 and U.S. Copyright Registration No. VA0001410959. The complaint further alleged that an industry in the United States exists as required by subsection (a)(2) of section 337. On August 12, 2009, the Commission determined not to review an ID (Order No. 7) granting a motion to amend the notice of investigation to clarify that Vending Plus, Inc., and Baltimore Beverage Co., comprise a single entity, Vending Plus, Inc. d/b/a Baltimore Beverage Co ("Vending Plus"). On September 30, 2009, the Commission determined not to review an ID (Order No. 11) granting a motion to amend the notice of investigation to include the following additional respondents: Posh Nosh Imports (USA), Inc., of South Kearny, New Jersey ("Posh Nosh"); Greenwich, Inc., of Florham Park, New Jersey ("Greenwich"); Advantage Food Distributors Ltd., of Suffolk, UK ("Advantage Food"), Wheeler Trading, Inc., of Miramar, Florida ("Wheeler Trading"); Avalon International General Trading, LLC, of Dubai, United Arab Emirates ("Avalon"); and Central Supply, Inc., of Brooklyn, NY ("Central Supply").

On January 5, 2010, the Commission determined not to review IDs (Order Nos. 21 and 22) finding Lamont and Avalon in default pursuant to Commission Rule 210.16. On January 20, 2010, the Commission determined not to review four IDs (Order Nos. 24, 25, 26, and 27) terminating the investigation as to respondents Wheeler Trading, Washington Food, India Imports, and Vending Plus on the basis of settlement agreements. On January 28, 2010, the Commission determined not to review IDs (Order Nos. 29 and 30) finding respondents Posh Nosh, Greenwich, Advantage Food, and Chicago Imports in default pursuant to Commission Rule 210.16. On February 16, 2010, the Commission determined not to review an ID (Order No. 32) finding respondent Central Supply in default pursuant to Commission Rule 210.16.

On December 2, 2009, Red Bull moved for summary determination on the issues of domestic industry, importation, and violation of Section 337. Pursuant to Commission Rule 210.16(c)(2), 19 C.F.R. § 216(c)(2), Red Bull also stated that it was seeking a general exclusion order. On December 23, 2009, the Commission investigative attorney submitted a response, in support of a finding that domestic industry exists and that Section 337 has been violated by defaulting respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import, but not by respondent Lamont. On January 13, 2010, again on March 10, 2010, Red Bull filed without objection supplemental declarations and attachments to its motion for summary determination.

On March 31, 2010, the presiding administrative law judge issued the subject final ID, Order No. 34, granting Red Bull's motion for summary determination of violation with respect to respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, and Chicago Import. He also recommended a general exclusion order and a 100 percent bond to permit importation during the Presidential review period.

No petitions for review were filed. The Commission has determined not to review Order No. 34.

In connection with the final disposition of this investigation, the Commission may (1) issue an order that could result in the exclusion of the subject articles from entry into the United

States, and/or (2) issue one or more cease and desist orders that could result in the respondent being required to cease and desist from engaging in unfair acts in the importation and sale of such articles. Accordingly, the Commission is interested in receiving written submissions that address the form of remedy, if any, that should be ordered. If a party seeks exclusion of an article from entry into the United States for purposes other than entry for consumption, the party should so indicate and provide information establishing that activities involving other types of entry either are adversely affecting it or likely to do so. For background, *see In the Matter of Certain Devices for Connecting Computers via Telephone Lines*, Inv. No. 337-TA-360, USITC Pub. No. 2843 (December 1994) (Commission Opinion).

If the Commission contemplates some form of remedy, it must consider the effects of that remedy upon the public interest. The factors the Commission will consider include the effect that an exclusion order and/or cease and desist orders would have on (1) the public health and welfare, (2) competitive conditions in the U.S. economy, (3) U.S. production of articles that are like or directly competitive with those that are subject to investigation, and (4) U.S. consumers. The Commission is therefore interested in receiving written submissions that address the aforementioned public interest factors in the context of this investigation.

If the Commission orders some form of remedy, the U.S. Trade Representative, as delegated by the President, has 60 days to approve or disapprove the Commission's action. *See* Presidential Memorandum of July 21, 2005. 70 *Fed. Reg.* 43251 (July 26, 2005). During this period, the subject articles would be entitled to enter the United States under bond, in an amount determined by the Commission and prescribed by the Secretary of the Treasury. The Commission is therefore interested in receiving submissions concerning the amount of the bond that should be imposed if a remedy is ordered.

WRITTEN SUBMISSIONS: Parties to the investigation, interested government agencies, and any other interested parties are encouraged to file written submissions on the issues of remedy, the public interest, and bonding. Complainants and the Commission investigative attorney are also requested to submit proposed remedial orders for the Commission's consideration. Complainants are also requested to state the HTSUS numbers under which the accused products are imported.

Written submissions must be filed no later than close of business on May 28, 2010. Reply submissions must be filed no later than the close of business on June 7, 2010. Such submissions should address the ALJ's recommended determinations on remedy and bonding which were made in Order No. 34. No further submissions on any of these issues will be permitted unless otherwise ordered by the Commission.

Persons filing written submissions must file the original document and 12 true copies thereof on or before the deadlines stated above with the Office of the Secretary. Any person desiring to submit a document to the Commission in confidence must request confidential treatment unless the information has already been granted such treatment during the investigation. All such requests should be directed to the Secretary to the Commission and must include a full statement of the reasons why the Commission should grant such treatment. *See* 19

C.F.R. § 201.6. Documents for which confidential treatment by the Commission is sought will be treated accordingly. All nonconfidential written submissions will be available for public inspection at the Office of the Secretary.

The authority for the Commission's determination is contained in section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), and in sections 210.16 and 210.42-46 of the Commission's Rules of Practice and Procedure (19 C.F.R. §§ 210.16; 210.42-46).

By order of the Commission.

Marilyn R. Abbott
Secretary to the Commission

Issued: May 14, 2010

CERTAIN ENERGY DRINK PRODUCTS **337-TA-678**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **NOTICE OF COMMISSION DECISION NOT TO REVIEW AN INITIAL DETERMINATION OF VIOLATION OF SECTION 337; SCHEDULE FOR SUBMISSIONS ON REMEDY, PUBLIC INTEREST, AND BONDING** has been served by hand upon the Commission Investigative Attorney, Juan Cockburn, Esq., and the following parties as indicated, on May 14, 2010.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

On Behalf of Complainants Red Bull GmbH and Red Bull North America, Inc.:

Raymond A. Kurz, Esq.
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

( ) Via Hand Delivery
( ) Via Overnight Mail
( ) Via First Class Mail
( ) Other: _____

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. 34: Initial Determination Finding Violation, Terminating The Investigation, And Further Recommending The Entry Of A General Exclusion Order And A 100% Bond

On December 2, 2009, pursuant to Commission rule 210.18, complainants Red Bull GmbH and Red Bull North America, Inc. (Red Bull), relying on certain attached declarations,[1] a supporting memorandum and certain undisputed material facts (SUMF), moved for summary determination on the issues of existence of a domestic industry, importation and violation of Section 337 of the Tariff Act of 1930 (as amended) by respondents Avalon International General Trading, LLC (Avalon), Posh Nosh Imports (USA), Inc. (Posh Nosh), Greenwich, Inc. (Greenwich), Advantage Food Distributors (Advantage Food), Central Supply, Inc., Chicago

[1] The following declarations were included with Motion No. 678-25:

the Declaration of Andrea Ceraico (Ceraico Dec.); the Declaration of Sélim Chidiac (Chidiac Dec.); the Declaration of Roland Concin (Concin Dec.); the Declaration of Ilene Eskenazi (Eskenazi Dec.); the Declaration of Sean Gallagher (Gallagher Dec.); the Declaration of Volker Viechtbauer (Viechtbauer Dec.); the Declaration of Ahmed Hamrah (Hamrah Dec.); the Declaration of Ravi Bhatia (Bhatia Dec.); the Declaration of Joaquin Davila (Davila Dec.); the Declaration of Hiren Shah (Shah Dec.); the Declaration of William Cawthorne (Cawthorne Dec.); the Declaration of James Sohn (Sohn Dec.); and the Declaration of Anna Kurian Shaw (Shaw Dec.).

Import Inc. and Lamont Dist., Inc. (Lamont) (referred to by complainants as "Defaulting Respondents") and further requested that the administrative law judge recommend that the Commission enter a general exclusion order, and that a bond equal in value to the value of the accused products be required during the Presidential review period. (Motion Docket No. 678-25).[2]

The staff, in a response dated December 23, 2009 (SR), argued that Motion No. 678-25 should be granted to the extent that a domestic industry exists, that Section 337 has been violated by defaulting respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, Inc., and Chicago Import Inc., and that the administrative law judge should recommend entry of a general exclusion order and a 100% bond. (SR at 39). Regarding respondent Lamont it argued that the offer for sale evidenced in Exhibit I to the Shaw Dec. was not completed and hence that there is no substantial, reliable, and probative evidence that Lamont imported into the United States the U.K. product referenced in Exh. J to the Shaw Dec. (SR at 11.)

---

[2] In a filing on December 11, 2009 by complainants' counsel Anna Kurian Shaw and addressed "To Whom It May Concern" it is represented:

> On December 9, 2009 Complainants Red Bull GmbH and Red Bull North America, Inc. ("Red Bull") received a request from the Honorable Paul J. Luckern that Red Bull serve on all Respondents in the above-referenced investigation and file with the Commission public versions of the Motion for Summary Determination and accompanying Statement of Fact which were filed on December 2, 2009. Attached are public versions of these documents. In order to obtain confidential copies of the attached documents as well as the accompanying confidential declarations of Ravi Bhatia, William Cawthorne, Andrea Ceraico, Selim Chidiac, Roland Concin, Joaquin Davila, Ilene Eskenazi, Sean Gallagher, Ahmed Hamrah, Hiren Shah, Anna Kurian Shaw, James Sohn, and Volker Viechtbauer, you must sign on to the Administrative Protective Order entered in connection with Investigation No. 337-TA-678.
>
> If you have any questions or comments, please contact us.

No other party responded to Motion No. 678-25.

On January 13, 2010, complainants filed a supplement to Motion No. 678-25. The administrative law judge in his Order No. 31, which issued on January 13, 2010, treated said supplement as Motion No. 678-33. No party responded to Motion No. 678-33.

On March 10, 2010, complainants filed a second supplement to Motion No. 678-25, which included a supplemental declaration of Roland Concin (Concin Suppl. Decl.). The administrative law judge in his Order No. 33, which issued on March 10, 2010, treated said supplement as Motion No. 678-34. The staff, in response to Motion No. 678-34, did not object to said second supplement which it argued is merely a statement of new facts and does not "augment" any of complainants' legal arguments.

Complainants, in support of Motion No. 678-25, argued that no disputed material facts exist regarding (1) whether a domestic industry exists within the meaning of 19 C.F.R. § 1337(a)(l)(C) with respect to Red Bull Energy Drink and Red Bull Sugarfee products (U.S. Red Bull Energy Drink) authorized for sale in the United States by complainant Red Bull GmbH through its exclusive distributor complainant Red Bull North America, Inc. (RBNA), said products featuring and protected by U.S. Reg. Nos. 3,092,197 for the RED BULL word mark, 2,946,045 for the Double Bull Design, 2,994,429 for the Red Bull Sugarfree Background Design and 3,479,607 for the composite front panel design (Red Bull Registered Marks) and the Red Bull Copyright Reg. No. VA0001410959 (Red Bull Copyright) covering the arrangement of elements appearing on the front of the U.S. Red Bull Energy Drink can; (2) whether Defaulting Respondents have unlawfully sold for importation into the United States, imported into the United States, and/or sold within the United States after importation the Gray Market

Unauthorized Red Bull Energy Drink; (3) whether Defaulting Respondents have infringed the Red Bull Registered Marks and the Red Bull Copyright; and (4) whether circumvention of an exclusion order limited to products of named entities is likely. It was further argued that there is a pattern of violation of 19 U.S.C. § 1337, and that it is difficult to identify the source of infringing products. Hence complainants argued that complainants Red Bull are entitled to summary determination with respect to the Defaulting Respondents, as a matter of law, on the issues of domestic industry, importation, and violation of Section 337 and that because of the likelihood of circumvention, pattern of violation, difficulty in identifying the source, and the fact that the public interest will not be harmed, complainants Red Bull are entitled to a general exclusion order. (Motion No. 678-25, Memo at 6.)

Complainants, in further support, argued that the U.S. Red Bull Energy Drink is, quite simply, a run-away success with over{ } cans sold since the products were first introduced in 1996 and 2003, respectively; that central to this success has been a carefully orchestrated brand image, significant quality control and safety efforts, and the delivery of a uniform and high quality product to consumers; that the singular success of the U.S. Red Bull Energy Drink pioneered the creation of the energy drink category in the United States, a category in which the U.S. Red Bull Energy Drink remains the leader more than a decade later; that because of the tremendous goodwill associated with the U.S. Red Bull Energy Drink, complainants Red Bull vigilantly monitor and control the marketing, advertising and promotion of the U.S. Red Bull Energy Drink, and the quality and safety of the U.S. Red Bull Energy Drink and as a result of these and other efforts by complainants Red Bull, the U.S. Red Bull Energy Drink is a breakthrough success and ubiquitous throughout the United States; that because of the incredible

popularity of the U.S. Red Bull Energy Drink and the well-established consumer demand for the products, the Defaulting Respondents and other unidentified importers and distributors have opportunistically sold for importation into, imported into, and/or sold within the United States certain Red Bull Energy Drink and Red Bull Sugarfree products which are authorized for sale in various countries of the world other than the United States (e.g., Ireland, the U.K., Turkey, Mexico, Singapore, and Pakistan (the Gray Market Red Bull Energy Drink); that Gray Market Red Bull Energy Drink contains a number of material differences from U.S. Red Bull Energy Drink, including, inter alia, omitting the U.S. Food and Drug Administration (FDA) required nutrition facts panel on the back of the can, omitting volumetric information on the front of the can, omitting requisite state deposit information, and identifying foreign distributors as contacts for customer inquiries and complaints; that the Gray Market Red Bull Energy Drink, which is manufactured in Europe and shipped to the United States for distribution, is not subject to Red Bull's quality control and safety procedures and thus, the sales of Gray Market Red Bull Energy Drink in the United States have damaged and threaten to continue to damage complainants Red Bull's valuable reputation and goodwill, and these sales also pose a risk to public safety because they are not subject to Red Bull's quality and safety control, including, for example, product recall and rotation procedures; that the sales of Gray Market Red Bull Energy Drink in the United States are widespread and sporadic, with numerous unknown and ever-changing entities involved; and that, during the course of this investigation, complainants Red Bull have learned of hundreds of entities that are engaged in such activities. (Id. Memo at 3-4.)

With respect to the events relating to the filing of Motion No. 678-25, by notice, dated June 12, 2009, the Commission instituted an investigation, pursuant to subsection (b) of section

337 of the Tariff Act of 1930, as amended, to determine (a) whether there is a violation of subsection (a)(1)(B) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain energy drink products by reason of infringement of said Red Bull Copyright, and whether an industry in the United States exists as required by subsection (a)(2) of section 337; and (b) whether there is a violation of subsection (a)(1)(c) of section 337 in the importation into the United States, the sale for importation, or the sale within the United States after importation of certain energy drink products by reason of infringement of said Red Bull Registered Marks and whether an industry in the United States exists as required by subsection (a)(2) of section 337.

Complainants Red Bull had filed the complaint, which resulted in the notice of investigation, on May 15, 2009, under section 337 of the Tariff Act of 1930, as amended. The complainants filed a letter supplementing the complaint on June 1, 2009. The following were named in the notice of investigation[3] as respondents and were served with the complaint:

Chicago Import Inc.
3801-11 West Laurence Avenue
Chicago, IL 60625

Lamont Dist., Inc.,
a/k/a Lamont Distributors Inc.
5 Lamont Court Suite 3A
Brooklyn, NY 11225

India Imports, Inc.,
a/k/a International Wholesale Club
2901 Richland Avenue
Metairie, LA 70002

---

[3] The notice of investigation was published on June 17, 2009. (74 Reg. No. 115 at 28725.)

Washington Food and Supply of D.C., Inc.,
a/k/a Washington Cash & Carry
1270 4th Street NE
Washington, DC 20002

Vending Plus, Inc.
2409 Peppermill Drive, Unit J
Glen Burnie, MD 21061

Baltimore Beverage Co.
2409 Peppermill Drive., Unit J
Glen Burnie, MD 21061

Order No. 3, which issued on July 1, 2009, required a correct address for respondent Lamont. Complainants, responding to Order No. 3 on July 8, 2009, represented that the correct address is the same address identified in the complaint. Thus, Order No. 5, which issued on July 9, 2009, requested complainants to effect personal service of the complaint and notice of investigation on Lamont.

Order No. 4, which issued on July 7, 2009, set a target date of September 17, 2010, which meant that any final initial determination on violation should be filed no later than May 17, 2010.

Order No. 7, which issued on July 21, 2009, granted complainants' Motion No. 678-3 which requested that the notice of investigation be amended to remove Vending Plus, Inc. and Baltimore Beverage Co., as separate respondents, and to replace them with a single respondent designated Vending Plus, Inc., d/b/a Baltimore Beverage Co (Vending). The Commission determined not to review Order No. 7 on August 12, 2009.

Order No. 11, which issued on September 8, 2009 granted complainants' Motion No. 678-9 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. The Commission determined not to review Order No. 11 on October 2, 2009.

Order No. 21, which issued on December 9, 2009, found respondent Lamont in default. Order No. 22, which also issued on December 9, 2009, found respondent Avalon in default. On January 5, 2010, the Commission determinated not to review Order Nos. 21 and 22.

Order No. 24, which issued on December 22, 2009, terminated the investigation as to respondent Wheeler based on a settlement agreement. Order No. 25, which issued on December 22, 2009, terminated the investigation as to respondent Washington based on a settlement agreement. Order No. 26, which issued on December 22, 2009, terminated the investigation as to respondent India Imports, Inc. based on a settlement agreement. Order No. 27, which issued on December 22, 2009, terminated the investigation as to respondent Vending based on a settlement agreement. The Commission determined not to review Order Nos. 24, 25, 26 and 27 on January 20, 2010.

Order No. 28, which issued on December 29, 2009, granted complainants' Motion No. 678-29 to the extent that the procedural schedule, which included evidentiary hearing dates of February 16, 17, 18, and 19, 2010, was suspended.

Order No. 29, which issued on January 8, 2010, found each of respondents Posh Nosh, Greenwich, and Advantage Food in default. Order No. 30, which issued on January 11, 2010, found respondent Chicago Import Inc. in default. On January 28, 2010, the Commission determined not to review Order Nos. 29 and 30.

Order No. 32, which issued on January 19, 2009, found respondent Central Supply, Inc.

in default. On February 16, 2010, the Commission determined not to review Order No. 32.

Pursuant to Commission rule 210.18(b), summary determination "shall be rendered if pleadings and any depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to summary determination as a matter of law." The evidence "must be viewed in the light most favorable to the party opposing the motion . . . with doubts resolved in favor of the nonmovant." Crown Operations Int'l, Ltd. v. Solutia, Inc., 289 F.3d 1367, 1375 (Fed. Cir. 2002) (internal citations omitted). "Issues of fact are genuine only if the evidence is such that a reasonable [fact finder] could return a verdict for the nonmoving party." Id. (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986)). In other words, the evidence is to be viewed in a light most favorable to the nonmovant, and all reasonable inferences must be drawn in favor of the nonmovant. Certain Condensers, Parts Thereof and Products Containing the Same, Including Air Conditioners for Automobiles, Inv. No. 337-TA-334, Views of the Commission at 3 (Nov. 25, 1992). Also, in moving for summary determination, the moving party bears the burden of (a) demonstrating the absence of any genuine issue of material fact, and (b) its entitlement to judgment as a matter of law. Certain Cigarettes and Packaging thereof, Inv. No. 337-TA-643 (Certain Cigarettes I), Comm'n Op. at 5 (Oct. 2009). Where, as here, no respondents contest the motion for summary determination because the respondents have either been terminated based on settlements or have not made an appearance and are defaulting, a determination of violation of Section 337 must be supported by "reliable, probative, and substantial evidence." See Certain Ink Markers and Packaging Thereof, Inv. No. 337-TA-522, Order No. 30 at 13-14 (Jul. 25, 2005) (Unreviewed Initial Determination); Certain Purple Protective Gloves, Inv. No. 337-TA-500,

Order No. 17 at 3-4 (Sept. 23, 2004) (Unreviewed Initial Determination); Certain Sildenafil or any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same, Inv. No. 337-TA-489, Comm'n. Op. Remedy, the Public Interest, and Bonding at 4-5 (Jul. 2004).

Pursuant to the notice of investigation, in issue are Trademark Reg. No. 3,092,197 for the RED BULL word mark, Trademark Reg. No. 2,946,045 for the Double Bull Design, Trademark Reg. No. 2,994,429 for the Red Bull Sugarfree Background Design, and Trademark Reg. No. 3,479,607 for the composite front panel design. (Chidiac Dec. at ¶11, Exs. I-L.) Each registration certificate indicates that complainants Red Bull are the owner of the marks. Id.

Under 15 U.S.C. §1057(b), a federal registration is prima facie evidence of the validity of the registered mark, the registrant's ownership of the mark, and the registrant's exclusive right to use the registered mark in commerce on or in connection with the goods or services specified in the certificate, subject to any conditions or limitations stated in the certificate.

The administrative law judge finds nothing in the record that calls into question the validity of the Red Bull Registered Marks at issue. Moreover, he finds that complainants Red Bull have been diligent about enforcing the asserted trademarks. (Eskenazi Dec. at ¶¶ 3, 9-10.) Thus Red Bull filed at least 13 trademark infringement and opposition actions to enforce its trademarks. (Id.) The trademarks have been subjected to opposition attacks by opposing parties in these actions and no tribunal has determined that the trademarks are invalid or unenforceable. (Id.) Hence, the administrative law judge finds no genuine issue of material fact exists as to whether the Red Bull Registered Marks in issue are valid and enforceable.

With respect to the Red Bull Copyright in issue, it depicts the Red Bull front label work

as a two-dimensional artwork. (Ex. M to the Chidiac Dec.) The copyright certificate indicates that Dietrich Mateschitz of Austria is the author of the work of art. (Id.) The certificate also indicates that the work of art was first published in 1987.[2] (Id.) This copyright was finally registered[3] upon recommendation by the Register of Copyrights after several rejections by the Copyright Office and after the artwork had been the subject of a district court litigation. (Ex. P of Shaw Dec.) The record does not indicate that the copyright has been found to be invalid or not enforceable by any court of law. {

} Hence the administrative law judge finds that complainants Red Bull have standing to enforce infringement of the Red Bull Copyright.[4]

I. Violation[5]

In issue is whether there is no genuine issue of any material facts as to the establishment of a domestic industry, and importation involving gray market trademark infringement and copyright infringement, and hence a violation of section 337, as amended.

---

[2] As the staff noted in its supporting memorandum (SR at 5) there is no presumption of validity where the copyright registration was applied for more than 5 years after first publication of the work of art. 17 U.S.C. §410(c).

[3] The registration date is May 14, 2004, (Ex. Q of Shaw Dec.)

[4] As the staff further noted, (SR at 5), pursuant to 17 U.S.C. §501(b), the legal or beneficial owner of an exclusive right under a copyright is entitled to institute an action for infringement of that particular right.

[5] The remedy portion of this initial determination commences at p. 39 and the bond portion of this initial determination commences at p. 47.

A. Domestic Industry

Each of complainants and the staff argued that a domestic industry exists with respect to Red Bull products, namely the U.S. Red Bull Energy Drink and Red Bull Energy and Sugarfree Shot products intended for sale in the Unites States (Red Bull Domestic Industry Products) featuring and protected by the Red Bull Registered Marks and the Red Bull Copyright. In order to establish that a domestic industry exists, a complainant must show that it meets both the technical and economic prongs of the domestic industry requirement. Certain Excimer Laser Systems for Vision Correction Surgery and Components Thereof and Methods for Performing Such Surgery, Inv. No. 337-TA-419, Pub. No. 3299, Initial Determination at 132 (Mar. 2000).

(i) Technical Prong

In order to meet the technical prong of the domestic industry requirement, the complainants must establish that the articles relating to the domestic industry are protected by the intellectual property at issue in the investigation. Certain Cigarettes I, Order No. 19, Initial Determination at 42-43 (Feb. 2009); Certain Ink Markers and Packaging Thereof, Inv. No. 337-TA-522, Pub. No. 3971, Order No. 30, Initial Determination at 48 (July 2005); Certain Microsphere Adhesives, Process for Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, Pub. No. 2949, Comm'n Op. at 8 (Jan. 1996).

The administrative law judge finds that the Red Bull Registered Marks in issue are featured on one or more of the Red Bull Domestic Industry Products sold in the United States. (SUMF, ¶¶ 20-23.) Specifically, U.S. Reg. No. 3,092,197 for the RED BULL word mark and U.S. Reg. No. 2,946,045 for the Double Bull Design in issue appear on all of the Red Bull

Domestic Industry Products. (SUMF, ¶¶ 20-23.) In addition, U.S. Reg. No. 2,994,429 for the Red Bull Sugarfree Background Design in issue appears on the U.S. Red Bull Sugarfree product and U.S. Reg. No. 3,479,607 for the composite front panel design in issue appears on the U.S. Red Bull Energy Drink product. (SUMF, ¶¶ 20-21.) Further, the Red Bull Copyright and/or derivative works appear on all of the Red Bull Domestic Industry Products. (SUMF, ¶¶ 20-23.) Specifically, the Red Bull Copyright in issue appears on the U.S. Red Bull Energy Drink product and the U.S. Red Bull Sugarfree product and derivative works of the Red Bull Copyright appear on the U.S. Red Bull Energy Shot product and U.S. Red Bull Sugarfree Shot product (U.S. Red Bull Shot Products). (SUMF, ¶¶ 20-23.)

The administrative law judge also finds that complainants Red Bull's sales of the Red Bull Domestic Industry Products are significant. Thus, since 1996, complainants Red Bull have sold{ }of U.S. Red Bull Energy Drink product in the United States; since 2003, they have sold{ } cans of U.S. Red Bull Sugarfree product in the United States; and since its introduction in 2009, Red Bull has sold { } bottles of U.S. Red Bull Shot Products in the United States. (SUMF, ¶ 24.)

Hence, the administrative law judge finds that there is no genuine issue of material fact and complainants Red Bull have satisfied the technical prong of the domestic industry requirement. See Certain Cigarettes I, Initial Determination at 43 (finding that the technical prong was satisfied based on extensive sales of products bearing the trademarks at issue); Certain Ink Markers, Initial Determination at 49 (holding that the technical prong was satisfied because the trademarks appear on the products sold in the United States); Certain Soft Sculpture Dolls, Inv. No. 337-TA-231, Pub. No. 1923, Initial Determination at 42 (July 1986) (holding that

domestic industry requirement was satisfied where the copyright appeared on products manufactured and sold in the United States); Osram GmbH v. International Trade Commission, 505 F.3d 1351, 1372 (Fed. Cir. 2007).

(ii) Economic Prong

The economic prong of the domestic industry requirement examines the extent to which the intellectual property right at issue is being utilized in the United States. Certain Ink Markers, Initial Determination at 50-52. Specifically, the Commission has found that a complainant meets this economic prong if even just one of the following is present in the United States: (i) significant investment in plant and equipment; (ii) significant employment of labor or capital; or (iii) significant investment in its exploitation, including engineering, research, and development, or licensing. 19 U.S.C. § 1337(a)(3); Certain Display Controllers with Upscaling Functionality and Products Containing Same, Inv. No. 337-TA-481, Order No. 27 at 4-5 (Apr. 2003). As found infra, all of these criteria have been satisfied by complainants Red Bull, and thus complainants Red Bull satisfy the economic prong.

The administrative law judge finds that complainants Red Bull have invested significantly in both plants and equipment in connection with providing the Red Bull Domestic Industry Products to the U.S. marketplace. {

} in the United States.

(SUMF, ¶ 25.) At the end of June 2009, more than{ } cans and bottles of Red Bull Domestic Industry Products had been manufactured in the United States. (SUMF, ¶ 26.) By the end of 2009, more than{ } cans and bottles of Red Bull Domestic Industry Products will have been manufactured in the United States. (SUMF, ¶ 27.) Complainant Red Bull GmbH has also purchased and installed{

} (SUMF, ¶ 29).

See Certain Liquid Crystal Display Devices and Products Containing the Same, Inv. No. 337-TA-631, Order No. 18, Initial Determination Granting Complainant's Motion at 7 (Sept. 2008) (holding that investments by wholly owned subsidiaries satisfied economic prong of domestic industry requirement).

The administrative law judge further finds that complainants Red Bull have made approximately{ } at its headquarters in Santa Monica, California. (SUMF, ¶ 30.) Part of this space consists of a warehouse, which complainant RBNA uses to store event logistics infrastructure, and to store U.S. Red Bull Energy Drink. (SUMF, ¶ 31.) Currently, this warehouse holds approximately{ } in event logistics inventory (e.g., tents, podiums, bars, tables, etc.). (SUMF, ¶ 31.) This event logistics infrastructure features one or more of Red Bull Registered Marks, Red Bull Copyright and/or derivative works of the Red Bull Copyright and is used at various marketing events to promote and market the U.S. Red Bull Energy Drink. (SUMF, ¶ 31.)

The administrative law judge also finds that complainant RBNA leases numerous other warehouse and storage space locations throughout the United States at which it stores, among other things, the U.S. Red Bull Energy Drink, marketing and point-of-sale materials, and event logistics infrastructure inventory (all of which feature several of the Red Bull Registered Marks, Red Bull Copyright and/or derivative works of the Red Bull Copyright). (SUMF, ¶ 32.) Specifically, he finds that RBNA's logistics partner has leased warehouse space, or "plants," on RBNA's behalf at eight facilities in the United States, where complainant RBNA stores U.S. Red Bull Energy Drink and marketing and point-of-sale materials used to promote the U.S. Red Bull Energy Drink. (SUMF, ¶ 33.) Said plants currently hold over{ } in point-of-sale inventory, all of which is owned by RBNA. (SUMF, ¶ 33.) Similarly, RBNA owns a significant amount of event logistics infrastructure inventory in addition to the inventory stored at its headquarters (valued at over{ } for the United States) which it uses to host events and otherwise promote the U.S. Red Bull Energy Drink and which it stores at various U.S. locations. (SUMF, ¶ 34.)

In addition, the administrative law judge finds that complainant RBNA expends significant amounts on corporate and promotional vehicles. (SUMF, ¶ 35.) In 2008 alone, this was nearly a { } expenditure. (SUMF, ¶ 35.) The promotional vehicles feature several of the Red Bull Registered Marks in issue and/or Red Bull Copyright and derivative works thereof and are used to promote and market the U.S. Red Bull Energy Drink. (SUMF, ¶ 35.)

The administrative law judge further finds that complainants Red Bull have made a significant employment of labor and capital relating to the Red Bull Domestic Industry Products in the United States. For example, the complainants have contracted with various entities to

manufacture the Red Bull Domestic Industry Products, requiring a significant employment of labor. {

}

The administrative law judge also finds that complainant RBNA employs{

} in the United States in various positions and in various locations throughout the United States who assist with the exploitation, including licensing and enforcement, of the Red Bull Registered Marks in issue and Red Bull Copyright in issue and the sale, distribution, quality assurance, promotion, marketing and advertising of U.S. Red Bull Energy Drink. (SUMF, ¶¶ 36, 53.) Moreover, one hundred percent of these employees' time is devoted to efforts relating to products featuring one or more of said Red Bull Registered Marks and/or said Red Bull Copyright and derivative works thereof. (SUMF, ¶ 36.) These employees perform various administrative, finance, human resource, information technology, marketing, operations, quality assurance, sales, and legal functions in the United States. (SUMF, ¶ 36.)

The administrative law judge also finds that complainants Red Bull have made significant investment in the exploitation of the Red Bull Registered Marks in issue and the Red Bull Copyright in issue, including research, development, and licensing. Thus, since 1996,

complainants Red Bull have expended{ } on advertising, marketing, and promoting the U.S. Red Bull Energy Drink products featuring the Red Bull Registered Marks and the Red Bull Copyright in the United States (SUMF, ¶ 40), see Certain Ink Markers, Initial Determination at 51-52 (finding that trademarks were exploited through advertising expenditures, including the sponsorship of NASCAR events); that between 2003 and 2008, complainants Red Bull spent over{ } dollars on marketing, advertising and promotional expenses in the United States, and in 2008 alone, Red Bull spent over{ } on marketing, advertising, and promotional expenses in the United States, all relating to the U.S. Red Bull Energy Drink featuring the Red Bull Registered Marks in issue and Red Bull Copyright in issue (SUMF, ¶ 40); that complainants Red Bull advertise the U.S. Red Bull Energy Drink in the United States through various means, including electronic media (namely television, movies, radio, and the Internet), print media (including newspapers, periodicals, and flyers), and other promotional materials (including in-store displays such as specially-manufactured U.S. Red Bull Energy Drink coolers) (SUMF, ¶ 41); that additionally, complainants Red Bull promote the U.S. Red Bull Energy Drink through a host of athletic events (e.g., Red Bull Flugtag, Red Bull Air Race, Red Bull Indianapolis Grand Prix and Red Bull New Year No Limits), sponsorships (e.g., NASCAR, Formula One, Red Bull Yamaha WCM, Honda Red Bull Racing, and various American athletes) as well as music festivals and cultural and community-based activities (e.g., Red Bull Music Academy and Red Bull Art of the Can) throughout the United States (SUMF ¶¶ 42-44, 46-47); and that further, complainants Red Bull own a U.S. Major League Soccer franchise, Red Bull New York. (SUMF, ¶ 43.)

The administrative law judge, in addition, finds that complainants Red Bull use the Red

Bull Registered Marks in issue and Red Bull Copyright in issue (and extensively licenses their use to third parties) in connection with numerous promotional and other items related to the U.S. Red Bull Energy Drink, such as on-premises signs, mirrors, aprons, notepads, and coolers, tents, umbrellas, and other outdoor promotional items, cars used for distributing samples of the U.S. Red Bull Energy Drink, clothing, including T-shirts and hats, and sports gear and decorations, including helmets, trophy stands, ramps, wind-surfing equipment, course flags, and finish lines, used in connection with the various athletic competitions sponsored by Red Bull. (SUMF ¶¶ 45, 48-50, 54.)

The administrative law judge also finds that complainants Red Bull have expended significant resources in conducting market research and advertising and marketing with respect to the U.S. Red Bull Energy Drink. Thus, complainants Red Bull have collected Nielsen market tracking information, { } and conducted other qualitative research in the United States, all relating to the Red Bull Domestic Industry Products. (SUMF, ¶ 52.) In addition, from 2000-2008, {

} (SUMF ¶ 52.)

Based on the foregoing, the administrative law judge finds that there is no genuine issue of material facts and complainants Red Bull have satisfied the economic prong of the domestic industry requirement. See Certain Ink Markers, Initial Determination at 50-52; Certain Cigarettes I, Initial Determination at 43-46; Certain Soft Sculpture Dolls, Initial Determination at 42-43.

B. Gray Market Trademark Infringement

In issue is whether complainants have established that there is no genuine issue of material facts as to the establishment of gray market infringement. Each of complainants and the

staff argued that gray market infringement has been established.

Complainants argued that the fact that the Unauthorized Red Bull Energy Drink which certain respondents, viz. respondents Lamont, Avalon, Posh Nosh, Greenwich, Advantage Food and Central Supply,[6] imported into the United States, sold for importation into the United States and/or sold after importation in the United States is materially different from U.S. Red Bull Energy Drink in a number of ways is not in dispute, and, thus, infringement is not in dispute; that those undisputed material differences include lack of complainants Red Bull's quality control and safety measures, failure to comply with federal and state laws and regulations relating to the labeling and packaging of the product and other differences in language, indicia and phrases appearing on the products; and that said continued importation, sale for importation and/or sale after importation of Unauthorized Red Bull Energy Drink has damaged and continues to threaten to damage the tremendous goodwill associated with the Red Bull Registered Marks in issue and the U.S. Red Bull Energy Drink. (Motion No. 678-25, Memo at 20-21.)

Infringement of a registered trademark under the Lanham Act constitutes a violation of Section 337. See 19 U.S.C. 1337(a)(1)(C). The Lanham Act prohibits the unauthorized use in commerce of a valid, enforceable, registered trademark in connection with selling, offering to sell, distributing or advertising any goods, where such use is "likely to cause confusion, or to cause mistake, or to deceive." 15 U.S.C. § 1114(1). Complainants argued that the accused products in this investigation are gray market Red Bull Energy Drink, which feature the valid, enforceable Red Bull Registered Marks in issue and which are materially different from U.S. Red

---

[6] Each of said respondents has been found in default. See events, supra, relating to the filing of Motion No. 678-25.

Bull Energy Drink, and that the importation into, sale for importation into and/or sale after importation in the United States of Gray Market Red Bull Energy Drink by defaulting respondents has not been authorized by Red Bull and is likely to cause confusion, or to cause mistake, or to deceive. Id.

Gray market goods are products that are "produced by the owner of the United States trademark or with its consent, but not authorized for sale in the United States." Gamut Trading Co. v. International Trade Commission, 200 F.3d 775, 777 (Fed. Cir. 1999). In determining whether the sale of gray market goods violates the Lanham Act and infringes the owner's federal trademark rights, the basic question is "whether there are differences between the foreign and domestic product and if so whether the differences are material." Bourdeau Bros., Inc. v. International Trade Commission, 444 F.3d 1317, 1321 (Fed. Cir. 2006) (emphasis added); see also Certain Cigarettes and Packaging Thereof, ITC Inv. No. 337-TA-424 (Certain Cigarettes II), Initial Determination at 7 (Oct. 2000). The Federal Circuit has stated that the standard for establishing materiality "is low" and noted that "there need only be one material difference between a domestic and a foreign product in order to determine that the latter is a gray market good eligible for exclusion." Bourdeau Bros., 444 F.3d at 1323-24.

(i) Use Of The Red Bull Registered Marks In Issue

The term "gray market goods" refers to genuine goods that, in this investigation, are of foreign manufacture, bearing a legally affixed foreign trademark that is the same mark as is registered in the United States; and that gray market goods are legally acquired abroad and then imported into the United States without the consent of the United States trademark holder. Gamut Trading Co. v. U.S. Int'l Trade Comm'n, 200 F.3d 775, 778 (Fed. Cir. 1999) (citing K

Mart Corp. v. Cartier, Inc., 486 U.S. 281, 286-87 (1987)). Thus, complainants Red Bull must show that the Unauthorized Red Bull Energy Drink cans containing said drink bear the same mark as the Red Bull Registered Marks. Here, complainants Red Bull have provided the sworn affidavit of Ilene Eskenazi, Vice President and General Counsel at complainant RBNA who attests that Red Bull Energy Drink and Red Bull Sugarfree products authorized for sale outside the United States (Gray Market Red Bull Energy Drink) also feature the Red Bull Registered Marks in issue and (Eskenazi decl. at ¶ 7.) Eskenazi's declaration is uncontested. Thus, the administrative law judge finds that the Unauthorized Red Bull Energy Drink cans with the drink bear the same trademarks as are registered in the United States by Red Bull.

To establish a Section 337 violation, a complainant must prove that the accused products, viz. Unauthorized Red Bull Energy Drink, were imported into the United States, sold for importation into the United States, or sold within the United States after importation. See 19 U.S.C, § 1337(a)(1)(C); Certain Cigarettes I, Initial Determination at 5. This importation requirement is designed to ensure only that there is "some nexus" between respondents' activities "and the importation of the gray market [products]." Id. at 10. Thus in this investigation, for complainants to succeed as to all of the Defaulting Respondents must show by reliable, probative, and substantial evidence that the Unauthorized Red Bull Energy Drink products bearing the U.S. trademarks at issue, were imported, sold for importation, or sold after importation into the United States by each of the Defaulting Respondents, and show that no genuine issue of material fact exists as to whether the Defaulting Respondents imported, sold for importation, or sold after importation gray market products.

(a) Defaulting Respondent Avalon

The administrative law judge finds that defaulting respondent Avalon, has sold accused products Red Bull Energy Drink authorized for sale in certain Asian countries (Asian Red Bull Energy Drink) for importation into the United States. Specifically, he finds that {

}

Further, the administrative law judge finds that Asian Red Bull Energy Drink sold for importation by Avalon was necessarily imported into the United States because the product is only manufactured outside of the United States and is only authorized for sale outside of the United States. Specifically, all Red Bull Energy Drink cans contain various markings identifying the countries or regions in which the particular product is authorized for sale and/or manufactured (SUMF, ¶ 60), which markings include a REXAM code appearing on the lower right-hand side of the front of each can beginning with an abbreviation identifying the country or region in which the product is authorized for sale. (SUMF, ¶ 60.) The administrative law judge also finds that Asian Red Bull Energy Drink Products display a REXAM code located on the lower right-hand side of the front of each can beginning with "INTAS2" (SUMF, ¶ 64); that the INTAS2 REXAM code appears only on products manufactured outside of the United States and authorized for sale only in certain Asian countries (SUMF, ¶¶ 55-60, 64); that this product is manufactured exclusively in Europe (SUMF, ¶¶ 55-59, 64); and that additionally, the Asian Red Bull Energy Drink states that it is "Made in Austria," and "Manufactured by: Red Bull Asia FZE,

Dubai Airport Free Zone, UAE." (SUMF, ¶ 64.)

(b) Defaulting Respondents Posh Nosh, Greenwich, And Advantage Food

The administrative law judge finds that defaulting respondents Posh Nosh, Greenwich and Advantage Food are{

} that publicly available bill of lading records identify Posh Nosh as the consignee for a shipment of "Red Bull" originating in Ireland that was imported into the United States (SUMF, ¶ 72); that additionally,{

} and that further, one of RBNA's distributors identified Posh Nosh as an entity that was selling Irish Red Bull Energy Drink in the United States. (SUMF, ¶ 75.)

The administrative law judge further finds that Irish Red Bull Energy Drink imported into and sold in the United States after importation by the Posh Nosh Entities was necessarily imported into the United States because the product is only manufactured outside of the United States, and is only authorized for sale outside of the United States as evidenced by various markings on the can (SUMF, ¶¶ 55-60, 62); that, for example, Irish Red Bull Energy Drink displays a REXAM code beginning with "IE" (SUMF, ¶ 62); that the IE REXAM code appears only on products manufactured outside of the United Sates and authorized for sale only in Ireland

(SUMF, ¶¶ 55-60, 62); that this product is manufactured exclusively in Europe (SUMF, ¶¶ 55-59); and that, additionally, the Irish Red Bull Energy Drink contains the phrases "Distribution for Republic of Ireland" and "Distribution for Northern Ireland" on the back of the can of said drink, and identifies Richmond Marketing Ltd., located in Dublin, Ireland, as the distributor for the Republic of Ireland and Upperedge Ltd., located in Belfast, Northern Ireland as the distributor for Northern Ireland. (SUMF, ¶ 62.)

(c) Defaulting Respondent Central Supply, Inc.

The administrative law judge finds that defaulting respondent Central Supply, Inc. has sold UK Red Bull Energy Drink within the United States after importation (SUMF, ¶ 67); that UK Red Bull Energy Drink sold in the United States was necessarily imported into the United States because the product is only manufactured outside of the United States, and authorized for sale only outside of the United States as evidenced by various markings on the can (SUMF, ¶¶ 55-60, 63, 67-69); that the UK Red Bull Energy Drink authorized to be sold in the United Kingdom displays a REXAM code beginning with "GB" (SUMF, ¶ 63); that the GB REXAM code appears only on products manufactured outside of the United States and authorized for sale only in Great Britain (SUMF, ¶¶ 55-60, 63); that this product is manufactured exclusively in Europe (SUMF, ¶¶ 55-59); and that additionally the UK Red Bull Energy Drink identifies "Red Bull Company Ltd., The Courtyard, 12 Sutton Row, London W1D 4AD" as the distributor. (SUMF, ¶ 63.)

(d) Defaulting Respondent Chicago Import Inc.

The administrative law judge finds that UK Red Bull Energy Drink sold in the United States was necessarily imported into the United States because the product is only manufactured

outside of the United States, and authorized for sale only outside of the United States as evidenced by various markings on the can as found supra (SUMF, ¶¶ 55-60, 63, 65) and that defaulting respondent Chicago Import Inc. has sold UK Red Bull Energy Drink at its store location in Chicago, Illinois. (SUMF, ¶ 65.)

(e) Defaulting Respondent Lamont

The administrative law judge finds that defaulting respondent Lamont{

} SUMF, ¶ 66 for sole support cites Shaw Decl., ¶ 11, Exh. I., which exhibit is identical to Exh. W of the complaint. Shaw Dec. ¶ 11 reads:

{

}

The administrative law judge finds Exhibit I is merely an offer for sale sent by respondent Lamont. He finds no evidence of any actual sale by Lamont in the United States.[7] Hence he

[7] Complainants argued that because Lamont has failed to respond to the complaint and/or amended complaint, upon issuance of a Commission determination finding Lamont to be in default, the allegations that Lamont has imported into, sold for importation into and/or sole in the United States after importation Gray Market Red Bull Energy Drink will be presumed to be true, merely citing Commission rule "210.16(c)" (Motion No. 678-25, Memo at 20). Commission rule 210.16(c) has two parts, viz. 210.16(c) (1) and 210.16 (c)(2). Commission rule 210.16(c)(2), not Commission rule 210.16(c)(1), applies where a complainant is requesting a general exclusion order. See Certain Plastic Molding Machines With Control Systems Having Programmable Operator Interfaces Incorporating General Purpose Computers, And Components Thereof II, Inv. No. 337-TA-462, Comm'n Op. at 11-12 (Finding that 210.16(c)(1) concerns the issuance of a limited exclusion order to a defaulting named respondent while 210.16(c)(2) applies to situations where complainant waits until the end of the investigation and seeks a general exclusion order where some respondents have been held in default.). Moreover Commission rule 210.16(c)(2) requires substantial, reliable and probative evidence.

finds no importation by respondent Lamont.[8]

(ii) Material Differences

In gray market cases before the Commission, trademark infringement, and thus a violation of 337, is established by proof that there are "material differences" between the gray market products and the products that are authorized for sale in the United States. Certain Agricultural Tractors, Comm'n Op. at 6 (Mar. 1997). The purpose of the material difference inquiry is to determine whether consumers are likely to be confused; if there is any material difference between the gray market goods and the authorized U.S. products, consumer confusion is presumed. Id., Certain Cigarettes I, Comm'n Op. at 6.

In order to show a violation, complainants must show that there are "material differences" between the accused products and the products authorized for sale in the United States. Certain Agricultural Tractors Under 50 Power Take-Off Horsepower, Inv. No. 337-TA-380, Comm'n Op. at 6 (Mar. 1997). Federal courts and the Commission apply a "low threshold" of what constitutes a material difference, requiring "no more than showing that consumers would be likely to consider the differences between the foreign and domestic products to be significant when purchasing the product, for such differences would suffice to erode the goodwill of the domestic source." See Gamut Trading Co. v. U.S. International Trade Commission, 200 F.3d 775

---

[8] The "Shaw Decl." does assert "[o]n behalf of Red Bull, Hogan & Hartson hired a private investigation to investigate Lamont. Attached as Exhibit J hereto is a true and correct copy of the investigation's report regarding Lamont". Viewing Exhs. I and J in a light most favorable to nonmovant Lamont, the administrative law judge however finds no evidence in said exhibit that Lamont imported into the United States or sold the accused product in the United States. With respect to Exhibits I and J, reference is made to Order No. 5, supra, which requested complainants to effect personal service of the complaint and notice of investigation on respondent Lamont.

at 779 (Fed. Cir. 1999).

Where an unauthorized product is not subjected to the same quality control as authorized products, material differences may be found to exist. See Certain Cigarettes I, Initial Determination at 28-31 (inability of complainant to control compliance with guidelines regarding stacking of product, storage and removal of product, what constitutes an unacceptable level of damage to shipping cases, and acceptable level of heat and sunlight to which the products could be exposed constituted a material difference). Material differences may also be found where a production code, such as a UPC label, is altered or removed from the unauthorized products. Zino Davidoff SA v. CVS Corp., 571 F.3d 238, 244 (Fed. Cir. 2009) (recognizing UPC codes as quality controls allowing detection of counterfeit products and recall of defective products).

Material differences have also been found where an unauthorized product fails to comply with federal and state laws and regulations. See Certain Cigarettes , Initial Determination at 18-19 (citing Bayer Corp. v. Custom School Frames, LLC, 259 F. Supp. 2d 503, 508 (E.D. La. 2003); Novartis Animal Health US, Inc. v. LM Connelly & Sons, Pty Ltd., 2005 WL 1721038 at *5) (S.D.N.Y. 2005).

The complainant in a gray market trademark infringement case must establish that all or substantially all of its authorized sales are accompanied by the asserted material difference in order to show that its goods are materially different from the gray market goods. Bourdeau Bros., 444 F.3d at 1321.

The record indicates that complainants Red Bull have not authorized any third parties to sell Gray Market Red Bull Energy Drink within the United States (SUMF, ¶¶ 166-167, 190-195). Complainants Red Bull have also undertaken a number of efforts to prevent the sales of Gray

Market Red Bull Energy Drink in the United States. (SUMF, ¶¶ 190-195.) For example, complainants Red Bull have sought to enforce their trademark rights as well as their copyright rights to prevent the sales of Gray Market Red Bull Energy Drink by filing federal lawsuits, sending cease and desist letters, recording its trademark and filing a Lever Rule application with Customs, investigating third parties, requesting discovery from third parties, publicizing its enforcement efforts and monitoring the marketplace. (SUMF, ¶¶ 191-194.) Additionally, Red Bull's agreements with their authorized distributors include provisions specifying and limiting the particular territories in which they are authorized to sell Red Bull Energy Drink and Red Bull Sugarfree. (SUMF, ¶ 195.)

{

}

{

}[9]

Complainants Red Bull GmbH and RBNA have implemented a number of procedures and guidelines relating to the quality control and safety of the U.S. Red Bull Energy Drink sold within the United States, SUMF, ¶¶ 90-91,94-141. Unlike the control they are able to exercise over the U.S. Red Bull Energy Drink, complainants Red Bull are unable to exercise control over the quality and safety of Gray Market Red Bull Energy Drink imported into and/or sold in the United States, including Gray Market Red Bull Energy Drink imported into and/or sold by the

---

[9] In the Concin Supp. Dec. submitted with Motion No. 678-34 Concin did represent:

{

}

Defaulting Respondents in the United States. (SUMF, ¶¶ 90-91, 94-164.)

The administrative law judge further finds that complainants Red Bull have implemented various controls, measures, and standards for each step of the transport, storage, and sale process for Red Bull Energy Drink that is intended for importation to the United States (U.S. Red Bull Energy Drink) (SUMF, ¶¶ 98-103; 116-17); that those controls include{

} and that the Red Bull Energy Drink imported by the defaulting respondents is not subject to these quality controls. (Id.)

The administrative law judge also finds that U.S. Red Bull Energy Drink cans have a batch code, expiration date and UPC code enabling complainants Red Bull to pinpoint where any products affected by a recall were distributed, (SUMF, ¶ 94, 152), and that the Unauthorized Red Bull Energy Drink cans with said drink do not feature UPC codes. (SUMF, ¶¶ 94, 146.)

The administrative law judge further finds that U.S. Red Bull Energy Drink cans with said drink feature nutritional information, volumetric information, and deposit information

required by federal and state laws and regulations (SUMF, ¶¶ 92-93), and that the Unauthorized Gray Market Red Bull Energy Drink cans omit these features. (SUMF, ¶¶ 142-144 (undisputed in pertinent part).)

Red Bull's quality control mechanisms extend beyond the transport, storage and shipping of U.S. Red Bull Energy Drink. For example, complainant RBNA's field personnel and authorized distributors frequently check U.S. retail locations where they know U.S. Red Bull Energy products are sold and examine the products, including the expiration date, to ensure proper quality control and rotation of products. (SUMF, ¶¶ 95, 140.) Additionally, U.S. Red Bull Energy Drink provides distributor contact information for complainant RBNA. (SUMF, ¶¶ 90-91, 145.) Thus, any complaints or inquiries regarding the U.S. Red Bull Energy Drink are directed to RBNA and addressed (SUMF, ¶ 91.)

Unlike U.S. Red Bull Energy Drink, the Gray Market Red Bull Energy Drink, imported into, sold for importation into and/or sold after importation in the United States is not subject to Red Bull's control. (SUMF,¶¶ 83-141, 142-44 (undisputed in material part), 145-48). For this reason alone, Gray Market Red Bull Energy Drink imported into, sold for importation into and/or sold after importation in the United States is materially different from U.S. Red Bull Energy Drink. See Certain Cigarettes I, Initial Determination at 29-30 (inability of complainant to control compliance with guidelines regarding the stacking of product, storage and removal of product, what constitutes an unacceptable level of damage to shipping cases, and acceptable level of heat and sunlight to which the products could be exposed constituted a material difference).

Further, each can of U.S. Red Bull Energy Drink has a batch code and expiration date that are displayed on the bottom of the U.S. Red Bull Energy Drink can. (SUMF, ¶ 95.) If it were

necessary to locate or recall product in the United States (e.g., if a particular batch was damaged or adulterated), complainants Red Bull would rely upon these batch codes and their own internal sales and distribution information to pinpoint where the affected products were distributed, thus making a more targeted, efficient, and effective pulling, rotating or recall of product possible. (SUMF, ¶ 95.) The batch codes on the Gray Market Red Bull Energy Drink cans imported into, sold for importation into and/or sold after importation in the United States are unaccounted for in complainant RBNA's internal sales and distribution information, making it impossible to successfully recall such product in the event that Red Bull needs to do so. (SUMF, ¶ 152.) Furthermore, the U.S. Red Bull Energy Drink products contain a RBNA-affiliated UPC code, which is standard to the U.S. and which enables Red Bull to track its products for its quality control purposes, while Gray Market Red Bull Energy Drink imported into, sold for importation into and/or sold after importation in the United States appear to use an EAN or other code (used in countries outside the U.S.), which contain a different format than a UPC code. (SUMF, ¶¶ 94,146.) Zino Davidoff SA v. CVS Corp., 571 F.3d 238, 243-44 (2d Cir. 2009) (holding that the omission of UPC codes was sufficient to support a finding of material difference).

Further, Gray Market Red Bull Energy Drink cans, imported into, sold for importation into and/or sold after importation in the United States, lacks several key pieces of information used by Red Bull in connection with its U.S. quality control efforts. For example, Gray Market Red Bull Energy Drink cans are typically missing the U.S. toll-free "877" number and feature the website address information of the foreign countries for which the Gray Market Red Bull Energy Drink was authorized for sale instead of the website address information for the U.S. Red Bull Energy Drink where consumers can contact complainant RBNA. (SUMF, ¶¶ 90, 145.) Such

toll-free number and website information is provided on the U.S. Red Bull Energy Drink, inter alia, in order to allow consumers to contact RBNA with any inquiries or concerns regarding the U.S. Red Bull Energy Drink, and serve as an important means for RBNA to gather information about potential problems or issues relating to the U.S. Red Bull Energy Drink. (SUMF, ¶¶ 90-91,145.) Because Gray Market Red Bull Energy Drink is not authorized for sale in the United States and, rather, is authorized for sale in other countries with different regulatory and other requirements, the Gray Market Red Bull Energy Drink imported into, sold for importation into and/or sold after importation in the United States fails to comply with various federal and state laws and regulations concerning the labeling of consumer products in the United States. (SUMF, ¶¶ 92-93, 142-144 (undisputed in material fact).)

While U.S. Red Bull Energy Drink is required by certain states to contain deposit information (e.g., California, Connecticut, Hawaii, Iowa, Maine, Massachusetts, Michigan, New York, Oregon and Vermont) Gray Market Red Bull Energy Drink cans imported, sold for importation into the United States and/or sold after importation in the United States lack such information. (SUMF, ¶¶ 65-77,93, 142-144). See Cal. Pub. Res. Code § 14560 to 14562; Conn. Gen. Stat. § 22a-244 to 22a-246; Haw. Rev. Stat. § 342G-102 to 342G-123; Iowa Code § 455C.2 to 455C.l6; Me. Rev. Stat. Ann. tit. 32 § 1863-A to 1873; Mass. Gen. Laws Ann. ch. 94 § 322 to 327; Mich. Compo Laws § 445.572 to 445.576; N.Y. Envtl. Conserv. Law § 27-1005 to 27-1019; Or. Rev. Stat. § 459 A. 705; Vt. Stat. Ann. tit. 10 § 1522 to 1527. This concern is all the more heightened as the defaulting respondent Central Supply, Inc. is located in New York, which requires state deposit information. (SUMF, ¶¶ 14-19.)

Additionally, Gray Market Red Bull Energy Drink imported, sold for importation and/or

sold after importation displays different product information than U.S. Red Bull Energy Drink. Specifically, Gray Market Red Bull Energy Drink cans sold for importation into the United States by Avalon contain the following notice: "Not recommended for children and persons sensitive to caffeine", while Gray Market Red Bull Energy Drink cans imported and sold or offered for sale in the United States by the Posh Nosh Entities, Central Supply, Inc., and Chicago Imported, Inc. contain a notice that the product has "High Caffeine Content" and show the phrase "A varied and balanced diet and a healthy lifestyle are recommended". (SUMF, ¶¶ 65-77; 142-144.) None of these statements appear on U.S. Red Bull Energy Drink. (SUMF, ¶¶ 42-144.)

Furthermore, Gray Market Red Bull Energy Drink cans imported into the United States, sold for importation into the United States, and/or sold after importation into the Unites States although written in English, are confusing to American audiences because they are intended for non-American consumers (e.g., consumers in parts of Asia, Great Britain and Ireland), and feature phraseology/terms and spellings (e.g., "flavourings" and "colours") that differ from standard American English and do not appear on U.S. Red Bull Energy Drink. (SUMF, ¶¶ 88, 142-144.) Also, while the U.S. Red Bull Energy Drink contains the well-known American recycling symbol, the Gray Market Red Bull Energy Drink cans imported, sold for importation and/or sold after importation contain different versions of the recycling symbol that are not generally known to American consumers. (SUMF, ¶¶ 89, 151.)

Complainants Red Bull also have received numerous complaints and reports from governmental consumer protection agencies, police enforcement and customers relating to Gray Market Red Bull Energy Drink, including Gray Market Red Bull Energy Drink identical to the products imported into the United States, sold for importation into the United States and/or sold

after importation into the United States. Thus during the course of this investigation, the Wisconsin Weights and Measures Inspectors conducted an investigation of products alleged to be Red Bull products at various locations and found several of those products did not include the quantity statement in appropriate inch-pound units, see SUMF,¶¶ 238-239. The record indicates that those products were Gray Market Red Bull Energy Drink Products identical to those sold for importation by Avalon. Additionally all of the Gray Market Red Bull Energy Drink imported and/or sold after importation by other defaulting respondents are missing inch-pound units, see SUMF, ¶¶ 238-239. The Inspectors further mistakenly believed that complainant RBNA was responsible for the sale of those Gray Market Red Bull Energy Drink and the Wisconsin Department of Agriculture Trade and Consumer Protection sent a warning letter to RBNA, see SUMF, ¶¶ 238-239. Moreover, police enforcement agencies have inquired with RBNA regarding the legality of Gray Market Red Bull Energy Drink. During the course of this investigation, a detective from the Major Crimes Task Force in Seattle contacted complainant RBNA to advise that one of his informants had obtained a can of Gray Market Red Bull Energy Drink in Texas that was identical to product sold for importation by Avalon and inquired whether the product was "legal." see SUMF, ¶¶ 240. The record further indicates that RBNA has also received numerous complaints regarding Gray Market Red Bull Energy Drink intended for sale in various countries including, among others, Singapore, Ireland, the Netherlands, Austria, certain countries in Asia and Argentina, see SUMF, ¶¶ 153, 159-164. Many of those products are identical to or contain many of the same material differences as Gray Market Red Bull Energy Drink imported into the United States, sold for importation into the United States and/or sold after importation into the United States, see SUMF, ¶¶ 65-77, 142-144, 153, 159-164. Thus, one

customer who had purchased Gray Market Red Bull Energy Drink informed RBNA: {

}

(iii) Conclusion

Based on the foregoing, the administrative law judge finds that there is no genuine issue of material facts and that complainants have established, that the defaulting respondents Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, Inc. and Chicago Import Inc. have committed a violation of 19 U.S.C. § 1337 (a)(1)(c) through their sales for importation into the United States, and/or sales within the United States after importation of gray market Red Bull energy drink with the Red Bull Registered marks in issue.

C. Copyright Infringement

Each of complainants and the staff have argued that copyright infringement has been established. Copyright infringement is an unfair act or method of competition under Section 337. Certain Soft Sculpture Dolls, Initial Determination at 75; Certain Products with Gremlin Character Depictions, Inv. No. 337-TA-201, Initial Determination at 10-17 (Dec. 1984). Subject to certain other requirements, 19 U.S.C. § 1337(a)(1)(B)(i) provides that it is unlawful to import into the United States, sell for importation, or sell within the United States after importation articles that infringe a valid and enforceable copyright. Complainants argued that the defaulting respondents' sale for importation into, importation into and/or sale after importation of Gray Market Red Bull Energy Drink manufactured and first sold abroad which features the Red Bull Copyright constitutes both copyright infringement and a violation of Section 337. (Motion No. 678-25, Memo at 35.)

Under U.S. copyright law, the owner of a copyright has the exclusive rights to distribute copies of the copyrighted work to the public by sale or other transfer of ownership. 17 U.S.C. § 106(3). Certain Soft Scrulpture Dolls, Comm'n Op. at 19 (Nov. 1986) (finding that sale of gray market goods infringed on complainants' copyright and violated the exclusive right of copyright holder to distribute copies and stating: "Every sale of an infringing article was a sale that should have gone to complainants, and one made by respondents, was irretrievably lost.") Further, U.S. copyright law makes clear that the act of importation into the United States of a copyright-protected work that was acquired outside the United States is an infringement of the exclusive right to distribute copies under Section 106 of the Copyright Act. 17 U.S.C. §; 606 Swatch S.A. v. New City, Inc., 454 F. Supp. 2d 1245, 1253 (S.D. Fla. 2006).

The administrative law judge has found, supra, that the Red Bull copyright is valid and enforceable, and that Red Bull has standing to enforce said copyright. Additionally, the administrative law judge finds that the Unauthorized Red Bull Energy Drink in cans, which is manufactured and first sold abroad see SUMF ¶¶ 55-77, 203-210, have been sold for importation into the United States, imported into the United States, or sold after importation into the United States by defaulting respondents, see SUMF, ¶¶ 206-10; that said respondents are not authorized to use said Red Bull Copyright for such goods, see SUMF, ¶ 203; and that said cans of Unauthorized Red Bull Energy Drink feature the Red Bull Copyright and/or derivative works based thereon, see SUMF, ¶ 205. Based on the foregoing, the administrative law judge finds that there is no genuine issue of material facts and that complainants have established that the sales for importation into the United States, importation into the United States, and/or sale within the United States after importation of Gray Market Red Bull Energy Drink by defaulting respondents

Avalon, Posh Nosh, Greenwich, Advantage Food, Central Supply, Inc. and Chicago Import Inc., with the Red Bull Copyright constitutes copyright infringement,[10] and have committed a violation of 19 U.S.C. §1337 (a)(2).

II. Remedy

Complainants argued that should the administrative law judge grant Motion No. 678-25, a general exclusion order should be recommended (Motion at 1). The staff supports the entry of a general exclusion order (SR at 39.)

Pursuant to 19 U.S.C. § 1337(d)(2)(A) and (B), issuance of a general exclusion order is appropriate if the Commission determines that "a general exclusion order from entry of articles is necessary to prevent circumvention of an exclusion order limited to products of named persons" or "there is a pattern of violation of this section and it is difficult to identify the source of infringing products." The Commission has recognized that it has the authority to issue a general exclusion order under 19 U.S.C. § 1337(d)(2)(A) and (B) upon summary determination where, as here, the last respondents have failed to appear. Thus in Certain Purple Protective Gloves, Inv. No. 337-TA-500, Comm'n Op. at 1-3 (December 29, 2004), complainants moved for summary determination on violation and for issuance of a general exclusion order with respect to a

---

[10] A first sale doctrine does provide that the owner of a copy "lawfully made under this title [of the copyright statute]" is entitled to sell or otherwise dispose of a copy without authority of the copyright owner. However such defense is inapplicable if the copies are manufactured and first sold outside the United States. See 17 U.S.C. § 109 (a); Swatch, 454 F. Supp. 2d at 1253-1254; Parfums Givenchy, Inc. v. Drug Emporium, Inc., 38 F.3d 477, 481 (9th Cir. 1994). In this investigation, the Gray Market Red Bull Energy Drink sold for importation into, imported into and/or sold after importation in the United States by said defaulting respondents is manufactured and first sold abroad and bears the Red Bull Copyright to which Red Bull has valid and exclusive U.S. rights. See SUMF, ¶¶ 55-77,203-210. As such, the first sale doctrine does not provide a defense for the unlawful acts relating to the Red Bull Copyright in issue in the United States.

remaining respondent who had defaulted.[11] The Commission determined not to review Order No. 17, which granted said summary judgement motion, and found under 19 U.S.C. § 1337(d)(2) that the appropriate remedy was a general exclusion order.

The Commission has also found that the existence of "widespread unauthorized use" as well as the particular business conditions surrounding the accused products is relevant to determining whether there is a pattern of violation under Section 337 (d)(2)(B). See Certain Airless Paint Spray Pumps and Components Thereof, Inv. No. 337-TA-90, Comm'n Op. at 18-19 (Nov. 1981); Certain Cigarettes I, Comm'n Op. at 25-26. Relevant factors include unauthorized importation into the United States of infringing articles by numerous foreign manufacturers, established demand for the authorized product in the U.S. market, the volume of sales of the accused products and the resulting revenue to infringing companies, and the availability of marketing and distribution networks in the United States for potential foreign manufacturers. Certain Airless Paint Spray Pumps, Comm'n Op. at 19; Certain Ink Cartridges, Initial Determination at 350-55. The Commission has held that when the infringing activity continues despite complainant's enforcement efforts, there exists a "pattern of violation." Certain Cigarettes I, Comm'n Op. at 25 (finding pattern of violation where infringing activity continued despite complainant's enforcement efforts to prevent such activity, including filing lawsuits, sending cease and desist letters, and investigating third parties).

In addition when determining whether to issue a general exclusion order under Section 337, the Commission has weighed the effect the order would have on four public interest factors: (l) the public health and welfare; (2) competitive conditions in the U.S. economy; (3) the

---

[11] The other respondents in Inv. No. 337-TA-500 had settled.

production of like or directly competitive articles in the U.S.; and (4) U.S. consumers. 19 U.S.C. § 1337(d); see also Certain Cigarettes I, Comm'n Op. at 27. As the Commission has noted, "[b]ecause section 337(d) mandates that the Commission 'shall direct that the articles concerned ... be excluded from entry' upon a finding of violation 'unless, after considering the effect of such exclusion upon' the public interest 'it finds that such articles should not be excluded,' we need only decide that public interest does not preclude our remedy." Id. at 28. The Commission has noted that the "U.S. public interest in the protection of intellectual property rights" can be a public interest factor in favor of the issuance of a general exclusion order. Certain Hydraulic Excavators, Comm'n Op. at 20. Also, where the continued importation of infringing gray market products "can itself pose safety risks for U.S. consumers, as well as [other] concerns ... due to differing [regulatory] standards," the issuance of a general exclusion order can further the public interest. Id. at 21; Certain Cigarettes I, Comm'n Op. at 29.

The administrative law judge finds that sales of Gray Market Red Bull Energy Drink in the United States are widespread and are not based solely on complainants' belief. Thus he finds that since the filing of the original complaint through discovery in this investigation alone, complainants have discovered the identities of numerous entities other than respondents who are engaged in the importation to, sale for importation and/or sale after importation of Gray Market Red Bull Energy Drink, which is evidence of widespread unauthorized use. (See SUMF, ¶ 232 wherein the following non-respondents are identified;{

}

{

}

Certain Cigarettes II, Comm'n Op. at 11 (Nov. 2000).) Further, respondents and other third parties have indicated that they have sold Gray Market Red Bull Energy Drink to hundreds, if not thousands, of customers who have purchased, served and/or sold the infringing products. (See SUMF, ¶¶ 232-233; Certain Hydraulic Excavators, Comm'n Op. at 18 (finding that sales by respondents to "hundreds if not thousands of customers who have purchased, owned, or served" the infringing products constitute evidence of widespread unauthorized use).) For example in 2009 alone, complainant RBNA and its authorized distributors have identified over two hundred and fifty suspected parties engaged in gray market activities across the United States, including in Maryland, Virginia, Pennsylvania, New York, Illinois, Texas, Louisiana, Florida and Washington. See SUMF, ¶¶ 212, 232-233, 238-240. Gray Market Red Bull Energy Drink is also widely available through sales catalogs, newsletters, brochures and websites, including online business-to-business portals. See SUMF, ¶¶ 235-236, 253, 256; Certain Digital Multimeters, Initial Determination at 20-21 (finding a widespread pattern of unauthorized use where "the accused products are widely available in large quantities for sale throughout the country, as reflected in sales catalogs, brochures and websites"). Moreover, complainant RBNA has learned of the identities of several of these entities through notifications from governmental consumer and police enforcement. See SUMF, ¶¶ 238-240. In addition to the numerous entities involved in these gray market activities, the Gray Market Red Bull Energy Drink being sold in the United States emanates from a wide array of countries such as Singapore, Argentina, Poland, Pakistan, Turkey, Finland, Mexico, United Kingdom, United Arab Emirates, and Ireland. See SUMF, ¶

241. Several of these Gray Market Red Bull Energy Drink cans feature additional differences relating to Gray Market Red Bull Energy Drink sold by the defaulting respondents, including, among other things, foreign language, over labels and/or inkjet stamps as well as different ingredients. See SUMF, ¶ 241; Original Appalachian Artworks, Inc. v. Granada Electronics, Inc., 816 F.2d 68, 73 (2d Cir. 1987) (finding material difference in Cabbage Patch Kid dolls because their instructions and adoption papers were in Spanish). Also the administrative law judge finds that complainants filed a district court action against an importer of Gray Market Red Bull Energy Drink and, after expending significant resources in connection with that proceeding, were able to obtain a successful district court action. See SUMF, ¶ 252. Additionally, complainants have filed multiple cases in federal district courts against various of the respondents for infringing their trademarks and copyright by importing into the United States or selling in the United States after importation Gray Market Red Bull Energy Drink Products. See SUMF, ¶ 193. Complainants also investigated and sought discovery from numerous third parties suspected of engaging in gray market activity in the United States. See SUMF, ¶¶ 191, 211, 248. When complainants were able to confirm the gray market activity of such suspected entities they have sent cease-and-desist letters to and entered into negotiations with such third parties requiring them to refrain from such activity. See SUMF, ¶¶ 211,249. In addition, complainants have recorded their trademarks and filed a Lever Rule application with Customs and also publicized its enforcement efforts through press releases and communications with its distribution network. See SUMF, ¶¶ 192, 194. Further, RBNA and its authorized distributors have monitored the marketplace for suspected gray market activity, and in 2009 alone, identified over two hundred and fifty suspected parties. See SUMF, ¶ 212.

The administrative law judge finds further that the business conditions support entry of a general exclusion order. Thus both the supply and demand for Gray Market Red Bull Energy Drink in the United States remain strong and individuals engaged in this activity tend to operate under multiple business identities. See SUMF, ¶¶ 1-6, 225, 227, 228, 235, 237, 242-247, 253. Additionally, there are very few, if any, barriers to entry for selling Gray Market Red Bull Energy Drink. See SUMF, ¶¶ 235, 253-255, 257,258. Once the Gray Market Red Bull Energy Drink is purchased, it is relatively easy and inexpensive to import it into the United States. See SUMF, ¶ 254. Also numerous entities are able to trade in Gray Market Red Bull Energy Drink merely by making a posting on an online business-to-business portal or by operating a website. See SUMF, ¶¶ 235, 253-254. Moreover there are minimal costs associated with selling Gray Market Red Bull Energy Drink. See SUMF, ¶ 255. Because Red Bull Energy Drink products are well known by consumers in the market as a result of complainants Red Bull' s extensive marketing, advertising and promotional efforts, there is no need for a distributor to incur advertising costs in connection with the sales of Gray Market Red Bull Energy Drink. See SUMF, ¶ 255. Indeed, in some instances, no costs, other than the costs of the goods sold are incurred. See SUMF, ¶ 257.

In addition, it is difficult to identify the source of infringing products. Thus companies selling Gray Market Red Bull Energy Drink are applying overlabels and/or stickers to the product which identify distributors unrelated to complainants Red Bull and/or their authorized distributors. See SUMF, ¶ 241. Also, there are extensive sales of Gray Market Red Bull Energy Drink on the internet, including on business-to-business portals where the identity of such sellers is hidden. See SUMF, ¶¶ 235, 236, 245, 253, 256. Further, in addition to the foreign respondents identified in this investigation, there are numerous foreign entities selling Gray Market Red Bull

Energy Drink online. See SUMF, ¶ 235. Red Bull's investigations, monitoring of the marketplace, and enforcement efforts have also revealed that gray market activity is widespread, opportunistic and sporadic making it difficult to identify the infringing source. See SUMF, ¶¶ 213, 231. For example, certain entities may engage in gray market activity for a short period of time and thus the window for identifying such party is brief. See SUMF, ¶ 215. Additionally, there are numerous entities, many of which appear to be smaller operations, engaged in such activity as opposed to a few single sources of Gray Market Red Bull Energy Drink in the United States. See SUMF, ¶ 216. As such, the identity of these entities is difficult to ascertain and is frequently changing. See SUMF, ¶ 214. Moreover Red Bull often only learns of such activities once the Gray Market Red Bull Energy Drink is available for sale in a retail or wholesale location open to the public. See SUMF, ¶ 217. At this point in the distribution channel, the retail or wholesale operator is often unwilling to identify the source of the Gray Market Red Bull Energy Drink Products. See SUMF, ¶ 217. For example, {

} Further, Red Bull's investigation of companies engaged in gray market activity indicate that such companies actively try to remain unknown and unidentifiable to investigating parties and/or hide the source of their products. See SUMF, ¶¶ 219-221. For example, publicly available shipping records often obscure the identity of the consignee and importer. See SUMF, ¶ 220. The desire to hide the identity of sources of Gray Market Red Bull Energy Drink is also illustrated by the lengths to which third parties in this investigation have fought third party subpoenas seeking testimony and information relating to the

source of Gray Market Red Bull Energy Drink they acquired. See SUMF, ¶ 221.

The administrative law judge further finds that a general exclusion order is in the public interest. Thus it is undisputed that the continued importation into, the sale for importation into and the sale after importation in the United States of Gray Market Red Bull Energy Drink will harm Red Bull's intellectual property rights in the Red Bull Registered Marks and the Red Bull Copyright. See SUMF, ¶¶ 78-80, 85, 141, 147-164, 199-204, 238-240, 259, 260.) Additionally, in view of the failure of the Gray Market Red Bull Energy Drink to comply with federal and state regulations regarding labeling and packaging and in view of the complaints and notifications received by complainant RBNA from various governmental consumer protection agencies and police enforcement regarding Gray Market Red Bull Energy Drink, including complaints concerning the failure of Gray Market Red Bull Energy Drink to comply with federal and/or state regulatory requirements, the administrative law judge finds that issuance of a general exclusion order is in the public interest. See SUMF, ¶¶ 142-144 (undisputed in pertinent part), 238-240, 259. Likewise, because Gray Market Red Bull Energy Drink is not subject to Red Bull's quality control and safety standards, including its recall procedures, and in view of the numerous consumer complaints Red Bull has received { } of Gray Market Red Bull Energy Drink, the administrative law judge finds that the public interest favors entry of general exclusion order. See SUMF, ¶¶ 96-140, 147-149, 155-164, 260. Also, there is no evidence that issuance of a general exclusion order will have any effect on competitive conditions in the United States or the production of other energy drink products. Hence, the administrative law judge finds that the public interest weighs in favor of issuance of a general exclusion order. See Certain Airless Paint Spray Pumps, Comm'n Op. at 21.

Based on the foregoing, the administrative law judge recommends the entry of a general exclusion order directed to certain energy drink products which infringe the Red Bull Registered marks in issue and the Red Bull Copyright in issue.

III. Bond

Complainants argued that a bond equal in value of the accused products be required during the Presidential review period (Motion at 1). The staff argued that a 100% bond, during the Presidential review period, be recommended.

Where the Commission enters a general exclusion order, entities may continue to import or sell their products during the pendency of the Presidential review period under a bond in an amount determined by the Commission to be "sufficient to protect the complainant from any injury." 19 C.F.R. § 210.50(a)(3). The Commission frequently sets the bond by attempting to eliminate the difference in sales price between the domestic product and the infringing product. See Certain Microsphere Adhesives, Process For Making Same, and Products Containing Same, Including Self-Stick Repositionable Notes, Inv. No. 337-TA-366, Comm'n Op. at 24 (Jan. 1996). Complainants argued that because defaulting infringers set their prices differently, a price comparison is difficult to determine. (Motion No. 678-25, Memo at 53.)

The administrative law judge finds that each of the defaulting respondents sets its price for infringing products differently See SUMF ¶¶ 262-265. Thus a price comparison would be difficult to accurately calculate. Hence he finds that a bond of 100% is appropriate.

IV. Conclusion

Motion No. 678-25 is granted to the extent that complainants have established in Motion No. 678-25 that defaulting respondents Avalon, Posh Nosh, Greenwich, Advantage Food,

Central Supply, Inc. and Chicago Import Inc. in their importation into the United States, and/or sale into the United States after importation of Grey Market Red Bull Energy Drink infringe the Red Bull Registered Marks and Red Bull Copyright in issue; that a domestic industry exists; and hence that there is a violation and the investigation should be terminated. Moreover a general exclusion order directed to certain energy drinks which infringe the Red Bull Registered marks in issue and the Red Bull Copyright in issue as well as a 100% bond during the Presidential review period are recommended.

This initial determination, pursuant to Commission rule 210.42(c), is hereby CERTIFIED to the Commission. Pursuant to Commission rules 210.42(h)(3) and 210.42(h)(6), this initial determination shall become the determination of the Commission within forty-five (45) 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.

This order will be made public unless a confidential version is received no later than the close of business on April 5, 2010.

Paul J. Luckern
Chief Administrative Law Judge

Issued: March 30, 2010

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 April 12, 2010.

Marilyn R. Abbott, Secretary
U.S. International Trade Commission
500 E Street, SW
Washington, DC 20436

COUNSEL FOR COMPLAINANTS RED BULL GmbH AND RED BULL NORTH AMERICA, INC.:

Raymond A. Kurz, Esq.
HOGAN & HARTSON LLP
Columbia Square
555 Thirteenth Street, NW
Washington, DC 20004-1109

( ) Via Hand Delivery
(✓) Via Overnight Mail
( ) Via First Class Mail
( ) Other:

PUBLIC MAILING LIST

Heather Hall LEXIS-NEXIS 9443 Springboro Pike Miamisburg, OH 45342	( ) Via Hand Delivery (✓) Via Overnight Mail ( ) Via First Class Mail ( ) Other: _____
Kenneth Clair Thomson West 1100 Thirteenth Street, NW, Suite 200 Washington, DC 20005	( ) Via Hand Delivery (✓) Via Overnight Mail ( ) Via First Class Mail ( ) Other: _____