

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 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.

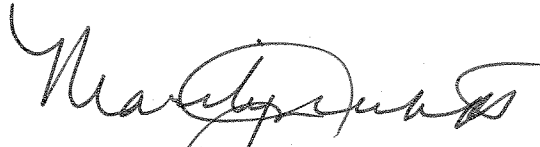
Having reviewed the record in this investigation, including the ALJ's recommended determination, the Commission has determined that the appropriate relief is a general exclusion order prohibiting the unlicensed entry of certain energy drink products that (i) infringe U.S. Trademark Registration Nos. 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.

A handwritten signature in black ink, appearing to read 'Marilyn R. Abbott', written in a cursive style.

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).

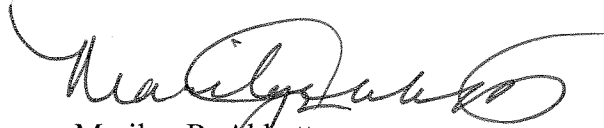
7. The Secretary shall serve copies of this Order upon each party of record in this investigation and upon the Department of Health and Human Services, the Department of Justice, the Federal Trade Commission, and the U.S. Customs and Border Protection.

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.

A handwritten signature in black ink, appearing to read "Marilyn R. Abbott", with a large, stylized flourish at the end.

Marilyn R. Abbott
Secretary to the Commission

Issued: September 8, 2010

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

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: _____