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## Trademark Dispute

Red Bull guru can't be forced to talk — yet

January 23, 2007

By: Forrest Normar

**A** federal magistrate judge ruled Monday that a South Florida company does not yet have the right to depose the Austrian marketing whiz behind a wildly successful energy drink in a trademark infringement case.

The hearing before U.S. Magistrate Judge William Turnoff in Miami was the latest development in a dispute dating to Oct. 14, 2005, when attorneys for Austrian energy drink Red Bull sent a cease-and-desist letter to a South Florida company, claiming their product was too similar to the popular caffeinated beverage.

Attorneys for Davie-based Vital Pharmaceuticals have been chasing after Red Bull's CEO Dietrich Mateschitz for weeks. Mateschitz, 58, owns 49 percent of the \$2 billion Austrian company. He has been mentioned in news reports as the source of the idea for the drink's formula — a tangy blend of taurine, caffeine and sugar — as well as the product's slick marketing campaign.

Attorneys for Vital Pharmaceuticals, which does business under a better-known corporate moniker, VPX Sports, have argued in motions to compel Mateschitz's deposition that his testimony is pivotal to the trademark dispute because he is the main source of Red Bull's product and marketing schemes.

Red Bull attorneys have argued that lower level executives should be deposed in the case instead.

Turnoff dismissed a motion to compel Mateschitz's testimony without prejudice, telling VPX's attorneys, Samuel Lewis and Chris Demetriades of Feldman Gale in Miami, to depose two other Red Bull executives first. "You can see what you get and then make a specific re-request to depose Mateschitz if necessary," Turnoff said.

The Feldman Gale attorneys represent VPX Sports founder John Owoc, who sells the nutritional, bodybuilding and weight-loss products to the fitness community using catchy names like Thinfat, Fiberteq, Dietex, and, recently, Redline.

The latter product — first sold as a liquid concentrate to be taken by the spoonful, then in 2005 repackaged as a beverage — apparently caught the attention of lawyers for Red Bull, leading to the cease-and-desist letter.

In an October 2005 letter, Red Bull accused VPX of trademark infringement.

"The Redline Energy Drink is packaged in a slim can prominently displaying the REDLINE trademark and featuring a blue and red color scheme, combined with a gray or silver twist-off cap," attorney Raymond Kurz of Hogan & Hartson's Washington office wrote in the cease-and-desist letter. "Such prominent use of a trademark including the term 'red,' combined with a blue, red and silver/gray color scheme, results in Redline Energy Drink evoking a confusingly similar commercial



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impression with the Red Bull Energy Drink.”

The disagreement blossomed into full-blown litigation just two weeks after Red Bull’s letter, when Redline attorneys Lewis, Gregg Metzger and Erica Stump from Feldman Gale filed a federal lawsuit asking the court to invalidate the trademark infringement claim. Redline’s attorneys are also asking the court for damages and legal fees.

They claim there is simply not much similarity between the products, and that Redline is marketed to a different community.

“Redline is specifically formulated for fitness,” Metzger said in an interview. “You won’t find it in the soft-drink section, which is exactly where you will find Red Bull. Because our product is for serious fitness enthusiasts, it might actually be damaging for our product to be associated with something that is basically caffeine, sugar and fizz.”

Kurz and Celine Jimenez Crowson from Hogan & Hartson’s Washington office represented Red Bull in court Monday. Red Bull has tried to keep Mateschitz away from Redline’s lawyers by claiming that he is an “apex official,” instead offering other corporate officers.

“It is, to put it mildly, brazen for Red Bull GmbH and Red Bull North America Inc. (collectively, “Red Bull”) to contend that it should not be required to produce Mr. Mateschitz — indisputably the person who adopted the Red Bull trademarks, trade dress and marketing plan and thus, indisputably a witness with relevant, first-hand knowledge,” Lewis wrote in a motion to compel Mateschitz’s testimony.

Turnoff urged the attorneys to schedule depositions with two Red Bull officers in the next 10 calendar days.

“I’m leaving now, and the cause of justice will be better therefore,” Turnoff quipped. “But I urge the parties to stay behind and schedule these depositions. Feel free to settle the case while you’re at it. You’re welcome to use our phones.”

Turnoff’s bout of wishful thinking would not bear fruit. After his departure, Lewis and Crowson spent less than five minutes attempting to schedule depositions before their conversation degenerated into a bout of bickering over which party had been least cooperative.

“Honestly, I’ve never been involved with people like this before,” Crowson hissed as she gathered her things to leave.

“Well, honestly, neither have I,” Lewis countered.

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