

UNITED STATES INTERNATIONAL TRADE COMMISSION

Washington, D.C.

In the Matter of

CERTAIN PRODUCTS ADVERTISED AS
CONTAINING CREATINE ETHYL ESTER

Inv. No. 337-TA-679

**ORDER NO. 5: DENYING COMPLAINANT'S MOTION FOR DEFAULT
DETERMINATION BUT GRANTING AN ORDER TO SHOW CAUSE REGARDING
ENTRY OF DEFAULT AGAINST THREE RESPONDENTS**

(September 2, 2009)

On July 21, 2009, Complainant UneMed Corporation ("UNEMED") filed a motion (679-003), pursuant to 19 U.S.C. § 1337(g)(1) and Commission Rule 210.16, seeking a determination that Respondents Bodyonics, Ltd. ("Bodyonics"), EST Nutrition LLC d/b/a/ Engineered Sports Technology ("EST"), NRG-X Labs ("NRG-X"), and Proviant Technologies, Inc. ("Proviant") are in default, based on these Respondents' failure to respond to the complaint and notice of investigation. On July 31, 2009, the Commission Investigative Staff ("Staff") filed a response opposing the motion for default, but supporting an order to show cause directed to Bodyonics, NRG-X, and Proviant. Staff agreed that, if Respondents Bodyonics, NRG-X, and Proviant do not respond to an order to show cause, it would then be appropriate to find them in default. Staff opposed an order to show cause directed to Respondent EST, based on a lack of effective service of the complaint and notice of investigation on EST.

On May 20, 2009, UNEMED filed a complaint with the Commission pursuant to Section 337 of the Tariff Act of 1930, as amended, 19 U.S.C. § 1337. The complaint, which was supplemented on June 5th, 8th, and 10th, alleges that these four Respondents, among others, violate Section 337 in connection with importation into the United States, sale for importation, and sale after importation

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of accused products that are the subject of this investigation (“SUBJECT CEE PRODUCTS”), which Respondents allegedly falsely advertised as containing creatine ethyl ester (*i.e.*, CM2 Alpha-Creatine Ethyl Ester-HCL). UNEMED asserts that Respondents’ advertising violates Section 43(a) of the Lanham Act, 15 U.S.C. § 1125(a) and the Nebraska Uniform Deceptive Trade Practices Act, R.R.S. Neb. § 87-302 (2008) because Respondents’ SUBJECT CEE PRODUCTS allegedly do not contain creatine ethyl ester. On June 17, 2009, the Commission issued a notice of investigation that was subsequently published in the Federal Register on June 23, 2009. 74 Fed. Reg. 29171 (June 23, 2009). Also on June 17, 2009, the Office of the Secretary attempted to serve, via Federal Express, copies of the complaint and notice of investigation on Respondents Bodyonics, NRG-X, Proviant, and EST at their respective last known addresses. (*See* Staff Exs. A-D; Summerfield Decl. Exs. 2, 4, 6, 8, 9, and 11.)

The Commission Secretary was successful in serving Bodyonics, NRG-X, and Proviant. (*See* Staff Exs. A-C.) With respect to Bodyonics, the served copy of the complaint and notice of investigation was returned to the Commission with a notation reflecting Bodyonics’ corporate status on the return envelope, *i.e.*, “Chapter 11,” (*see* Staff Ex. A; Summerfield Decl. at ¶ 3), which indicates that Bodyonics received the complaint and notice of investigation and thus has adequate notice of this Investigation.¹ With respect to NRG-X, the served copy of the complaint and notice of investigation was refused, (*see* Staff Ex. B), which indicates that NRG-X received the complaint

¹ In other words, it was not returned to the Secretary as “undelivered,” which has been found to be a sufficient indication of receipt to justify the issuance of a show-cause order under Commission Rule 210.16(a)(1). *See Certain Lighters*, Inv. No. 337-TA-575, Order No. 6 (Aug. 16, 2006); *Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Order No. 13 (May 13, 2003).

and notice of investigation and thus has adequate notice of this Investigation.² With respect to Proviant, the served copy of the complaint and notice of investigation was successfully delivered on June 18, 2009, (*see* Staff Ex. C), which indicates that Proviant received the complaint and notice of investigation and thus has adequate notice of this Investigation.³

Section 337(g) of the Tariff Act of 1930 and Commission Rule 210.16 each provide that a respondent shall be found in default if it 1) fails to respond to or otherwise answer the complaint and notice of investigation and 2) fails to show cause why it should not be found in default. *See* 19 U.S.C. § 1337(g)(1)(C); 19 C.F.R. § 210.16(a)(1). The undersigned may order a respondent to show cause why it should not be found in default if the respondent has failed to respond to the complaint and notice of investigation in the manner prescribed by Commission Rule 210.13. *See* Commission Rule 210.16(b); 19 C.F.R. § 210.16(b).

Under the Commission's Rules of Practice and Procedure, Bodyonics, NRG-X, and Proviant's responses to the complaint and notice of investigation were due on July 8, 2009. As of this date, *i.e.*, September 2, 2009, none of these Respondents have filed a response to the complaint and notice of investigation. Thus, the undersigned finds that there is good cause to order Bodyonics, NRG-X, and Proviant to show cause why they should not be found in default. *See Certain Coaxial*

² Refusal to accept service of a complaint and notice of investigation is sufficient grounds for issuance of an order to show cause. *See Certain Automotive Measuring Devices, Products Containing Same, and Bezels for Such Devices*, Inv. No. 337-TA-494, Order No. 27 (May 17, 2004); *Certain Compact Multipurpose Tools*, Inv. No. 337-TA-416, Order No. 12 at 3 (Mar. 16, 1999). In addition, while discovery requests and correspondence sent by UNEMED to NRG-X were returned to UNEMED, (Summerfield Decl. at ¶ 10), there is no indication in the Commission records that the undersigned's Order Nos. 1 and 2 that were sent by the Commission Secretary to NRG-X were returned to the Commission as undeliverable. (Staff Br. at 4.)

³ In addition, while discovery requests and correspondence sent by UNEMED to Proviant were returned to UNEMED, (Summerfield Decl. at ¶ 11), there is no indication in the Commission records that the undersigned's Order Nos. 1 and 2 that were sent by the Commission Secretary to Proviant were returned to the Commission as undeliverable. (Staff Br. at 4.)

Cable Connectors and Components Thereof and Products Containing Same, Inv. No. 337-TA-650, Order No. 7 (Aug. 27, 2008); *Certain Ink Markers and Packaging Thereof*, Inv. No. 337-TA-522, Order No. 8 (Nov. 18, 2004); *Certain Oscillating Sprinklers, Sprinkler Components, and Nozzles*, Inv. No. 337-TA-448, Order No. 4 (Mar. 30, 2001); *Certain Compact Multipurpose Tools*, Inv. No. 337-TA-416, Order No. 8 (Feb. 3, 1999); *Certain Toothbrushes and Packaging Thereof*, Inv. No. 337-TA-391, Order No. 5 (July 2, 1997).

With respect to Respondent EST, the copy of the complaint and notice of investigation sent by the Office of the Secretary was returned to the Commission as undeliverable. (*See Staff Ex. D.*)⁴ There is no evidence to support a conclusion that EST deliberately avoided service of the complaint and notice of investigation. (*See Staff Br. at 5.*) Therefore, the undersigned finds that EST has not been served with a copy of the complaint and notice of investigation as required by Section 337(g)(1)(B) and that it is not appropriate, at this time, to order EST to show cause why it should not be held in default. *See, e.g., Certain Sildenafil or Any Pharmaceutically Acceptable Salt Thereof, Such as Sildenafil Citrate, and Products Containing Same*, Inv. No. 337-TA-489, Order No. 12 at 3 (May 13, 2003) (stating, “There being no evidence that either [Respondent has] been served with the Complaint and Notice of Investigation as required by Section 337(g)(1)(B), nor any evidence that those respondents have been deliberately avoiding service, there is no reason to issue an order requiring them to show cause why they should not be held in default at this time.”)


In view of Bodyonics’, NRG-X’s, and Proviant’s failure to respond to the complaint, notice of investigation and, in the case of NRG-X and Proviant, failure to respond to UNEMED’s discovery

⁴In addition, discovery requests and correspondence sent by UNEMED to EST were returned to UNEMED, (Summerfield Decl. at ¶ 7), and the undersigned’s Order Nos. 1 and 2 that were sent by the Commission Secretary to EST were returned to the Commission as undeliverable. (*See Staff Ex. D.*)

requests, as well as these Respondents' failure to inform the Commission why they did not respond UNEMED's motion for a default determination, the undersigned hereby grants an order to show cause why they should not be found in default.

Bodyonics, NRG-X, and Proviant are hereby ordered, **no later than the close of business on September 16, 2009**, to show cause why they should not be found in default for failing to respond to the complaint and notice of investigation. In the absence of any showing of good cause within said time period, the undersigned will enter an initial determination of default against Bodyonics, NRG-X, and Proviant.

SO ORDERED.

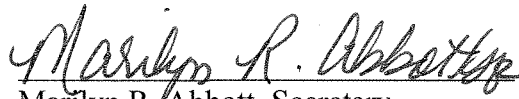


Charles E. Bullock
Administrative Law Judge

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CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER NO. 5** has been served upon, **Erin D.E. Joffre, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on September 3, 2009.



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U.S. International Trade Commission
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