

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

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**ORDER NO. 4: INITIAL DETERMINATION GRANTING JOINT MOTION FOR  
TERMINATION OF RESPONDENT SAN CORPORATION FROM INVESTIGATION  
PURSUANT TO CONSENT ORDER**

(August 27, 2009)

On July 13, 2009, Complainant UneMed Corporation (“UNEMED”) and Respondent San Corporation (“SAN”) filed a joint motion (679-002) to terminate this Investigation as to SAN based upon a consent order stipulation and proposed consent order. On July 29, 2008, the Commission Investigative Staff (“Staff”) filed a response in support of the motion. No other responses were received.<sup>1</sup>

I. Consent Order

In accordance with Commission Rule 210.21(c)(1)(ii), the parties entered into a “Consent Order Stipulation” and a proposed “Consent Order,” attached hereto as Appendix A and Appendix B, respectively. Commission Rule 210.21(c)(3) sets forth certain requirements for the contents of a consent order stipulation. 19 C.F.R. § 210.21(c)(3). The Consent Order Stipulation submitted by SAN complies with the requirements of Commission Rule 210.21(c)(3). (*See Staff Resp. at 3.*)

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<sup>1</sup> On August 7, 2009, SAN filed an unopposed motion (679-004) to stay the procedural schedule as to itself in this Investigation pending resolution of the joint motion to terminate. The undersigned hereby dismisses the motion to stay (679-004) as moot.

Specifically, SAN agrees that upon entry of the Consent Order, SAN will not sell for importation or import into the United States, sell in the United States after importation, or knowingly aid, abet, encourage, participate in, or induce the sale for importation, importation into the United States, or sale in the United States after importation of the accused products that are the subject of this investigation (“SUBJECT CEE PRODUCTS”), which SAN allegedly advertised as containing creatine ethyl ester (*i.e.*, CM2 Alpha-Creatine Ethyl Ester-HCL), or knowingly aid, abet, encourage, participate in, or induce advertisement of the SUBJECT CEE PRODUCTS as containing creatine ethyl ester. (*See* Consent Order Stipulation at ¶ F; Proposed Consent Order at ¶ 1.) SAN agrees to report to the Commission the quantity and value in dollars of the SUBJECT CEE PRODUCTS that it has already imported or sold after importation into the United States during the specified reporting periods, as well as the quantity of such reported SUBJECT CEE PRODUCTS that remains in SAN’s inventory at the end of the reporting periods. (*See* Proposed Consent Order at ¶ 9.)

In addition, pursuant to Commission Rule 210.21(c)(3)(i)(A), SAN agrees to:

- (1) admit that the Commission has *in rem* jurisdiction over the SUBJECT CEE PRODUCTS and *in personam* jurisdiction over SAN in this Investigation (*see* Consent Order Stipulation at ¶ A);
- (2) expressly waive all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order (*see* Consent Order Stipulation at ¶ B);
- (3) cooperate with and not seek to impede by litigation or other means the Commission’s efforts to gather information under Subpart I of Part 210 of Title 19 of the Code of Federal Regulations (*see* Consent Order Stipulation at ¶ C); and,

(4) the enforcement, modification, and revocation of the Consent Order, which will be carried out pursuant to Subpart I of Part 210 of Title 19 of the Code of Federal Regulations, incorporating by reference the Commission's Rules of Practice and Procedure (*see* Consent Order Stipulation at ¶ D).

In addition to the provisions required by Commission Rule 210.21(c)(3), the Consent Order Stipulation contains additional provisions, including a statement that the signing of the Consent Order Stipulation by SAN is for settlement purposes only and does not constitute an admission by SAN that an unfair act has been committed. (*See* Consent Order Stipulation at ¶ E.) This is permitted by Commission Rule 210.21(c)(3)(i)(C), which provides that a consent order stipulation may contain a statement that it is for settlement purposes and does not constitute an admission that an unfair act has been committed.

## II. Public Interest

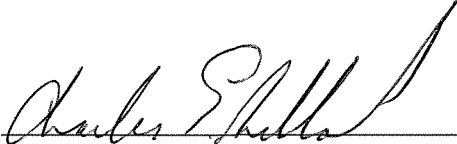
In any initial determination terminating an investigation by settlement agreement or consent order, the administrative law judge is directed to consider and make appropriate findings regarding the effect of the proposed settlement on the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States, and United States consumers. 19 C.F.R. § 210.50(c)(2)(ii); *see also* 19 C.F.R. § 210.50(b)(2). In their motion, the parties assert that termination of this Investigation will not prejudice any remaining respondents in the Investigation, is in the interest of administrative economy, and will not adversely affect the public interest. (*See* Mot. at 1-2; *see also* Consent Order Stipulation at ¶ H.) Staff supports the motion to terminate, stating that it is not aware of any information that would indicate that termination of this Investigation based on the proposed Consent Order would be contrary to the

public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States, or United States consumers. (See Staff Resp. at 5.) In addition, Staff asserts that the public interest generally favors settlement to avoid needless litigation and to conserve public and private resources. (See Staff Resp. at 5.) The undersigned agrees that termination of this Investigation does not impose any undue burdens on the public health and welfare, competitive conditions in the United States economy, production of like or directly competitive articles in the United States, or United States consumers.

Accordingly, the undersigned finds that the parties have complied with the requirements of Commission Rule 210.21(b) and (c) and it is the undersigned's Initial Determination that the motion (611-002) to terminate this Investigation with respect to SAN based on consent order be granted. This Initial Determination, along with supporting documentation, is hereby certified to the Commission.

Pursuant to 19 C.F.R. § 210.42(h), this Initial Determination shall become the determination of the Commission unless a party files a petition for review of the Initial Determination pursuant to 19 C.F.R. § 210.43(a), or the Commission, pursuant to 19 C.F.R. § 210.44, orders, on its own motion, a review of the Initial Determination or certain issues herein.

**SO ORDERED.**

  
\_\_\_\_\_  
Charles E. Bullock  
Administrative Law Judge

## APPENDIX A



SAN has engaged in false advertising of the SUBJECT CEE PRODUCT as containing creatine ethyl ester;

WHEREAS UNEMED and SAN (collectively "THE PARTIES") wish to settle and terminate the investigation with respect to SAN pursuant to the terms of this Consent Order Stipulation and the proposed Consent Order appended hereto as Exhibit A; and

WHEREAS SAN agrees to all terms set forth in the Consent Order.

NOW THEREFORE, in support of THE PARTIES' Joint Motion to Terminate the Investigation Based Upon a Consent Order, IT IS HEREBY STIPULATED by SAN as follows:

A. The Commission has *in rem* jurisdiction over the SUBJECT CEE PRODUCT that is the subject of the Complaint in this investigation as it relates to SAN and the Commission has *in personam* jurisdiction over SAN for purposes of the Consent Order Stipulation and Consent Order.

B. SAN expressly waives all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order.

C. SAN will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Subchapter C, Part 210.

D. Enforcement, modification, or revocation of the Consent Order will be carried out pursuant to subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Subchapter C, Part 210. In determining whether SAN is in violation of this Consent Order, the Commission may infer facts adverse to SAN if SAN fails to provide adequate or timely information. The Commission may impose upon any person who

violates the Consent Order a penalty of not more than the greater of \$100,000 or twice the domestic value of any articles entered or sold for each day on which the Consent Order is violated. The Commission's assessment of any such penalty shall have the force of a judgment and liability for payment of such penalty shall accrue upon administrative assessment by the Commission.

E. The signing of this Consent Order Stipulation and entry of the Proposed Consent Order is for settlement purposes only and does not constitute an express or implied admission by SAN that any unfair method of competition or unfair act has been committed.

F. SAN stipulates that it shall not import into the United States, sell in the United States after importation, or knowingly aid, abet, encourage, participate in, or induce the importation into or sale in the United States of, the SUBJECT CEE PRODUCT, and that it shall not advertise, or knowingly aid, abet, encourage, participate in, or induce advertisement of, the SUBJECT CEE PRODUCT as containing creatine ethyl ester.

G. Other than a Settlement Agreement between UNEMED and SAN, a copy of which will be provided to the Commission, there are no agreements, written or oral, express or implied, between SAN and UNEMED concerning the subject matter of this investigation, other than this Consent Order Stipulation between them.

H. The Settlement Agreement entered into by THE PARTIES, this Consent Order Stipulation, and the attached Consent Order are in the public interest.

**IT IS SO STIPULATED.**

Date: July 8<sup>TH</sup> 2009

  
\_\_\_\_\_  
Matthias Boldt  
San Corporation

## APPENDIX B



SAN denies the allegations made in the Complaint filed by UNEMED in this investigation, and in particular denies UNEMED's allegations that SAN has engaged in false advertising of the SUBJECT CEE PRODUCT as containing creatine ethyl ester.

SAN has executed a Consent Order Stipulation in which it agrees to the entry of this Consent Order and to all waivers and other provisions as required by Commission Rule of Practice and Procedure 210.21(c) (19 C.F.R. § 210.21(c)), and UNEMED and SAN have filed a Joint Motion to Terminate the Investigation as to SAN based on the Consent Order Stipulation and proposed Consent Order. In particular, SAN has stipulated as follows:

A. The Commission has *in rem* jurisdiction over the SUBJECT CEE PRODUCT that is the subject of the Complaint in this investigation as it relates to SAN and the Commission has *in personam* jurisdiction over SAN for purposes of the Consent Order Stipulation and Consent Order.

B. SAN expressly waives all rights to seek judicial review or otherwise challenge or contest the validity of the Consent Order.

C. SAN will cooperate with and will not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Part 210.

D. Enforcement, modification, or revocation of the Consent Order will be carried out pursuant to subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Part 210. In determining whether SAN is in violation of this Consent Order, the Commission may infer facts adverse to SAN if SAN fails to provide adequate or timely

information. The Commission may impose upon any person who violates the Consent Order a penalty of not more than the greater of \$100,000 or twice the domestic value of any articles entered or sold for each day on which the Consent Order is violated. The Commission's assessment of any such penalty shall have the force of a judgment and liability for payment of such penalty shall accrue upon administrative assessment by the Commission.

E. The signing of the Consent Order Stipulation and entry of the Proposed Consent Order is for settlement purposes only and does not constitute an express or implied admission by SAN that any method of competition or unfair act has been committed.

F. SAN stipulates that it shall not import into the United States, sell in the United States after importation, or knowingly aid, abet, encourage, participate in, or induce the importation into or sale in the United States of, the SUBJECT CEE PRODUCT, and that it shall not advertise, or knowingly aid, abet, encourage, participate in, or induce advertisement of, the SUBJECT CEE PRODUCT as containing creatine ethyl ester.

G. Other than a Settlement Agreement entered into by the Complainant and SAN, a copy of which has been provided to the Commission, there are no other agreements, written or oral, express or implied, between SAN and the Complainant concerning the subject matter of this investigation, other than the Consent Order Stipulation between them. There is nothing in the Settlement Agreement between the Complainant and SAN or in the Consent Order Stipulation that would adversely affect the public interest.

NOW THEREFORE, THE COMMISSION HEREBY ORDERS THAT:

1. Upon entry of this Consent Order, SAN shall not import into or sell in the United States after importation, or knowingly aid, abet, encourage, participate in, or induce the importation into or sale in the United States of, the SUBJECT CEE PRODUCT, and shall not advertise, or knowingly aid, abet, encourage, participate in, or induce advertisement of the SUBJECT CEE PRODUCT as containing creatine ethyl ester.

2. This Consent Order shall be applicable to and binding upon SAN, its officers, directors, agents, servants, employees, and all persons, firms, or corporations acting or claiming to act on their behalf or under its direction or authority.

3. SAN shall be precluded from seeking judicial review or otherwise challenging or contesting the validity of this Consent Order.

4. SAN shall cooperate with and shall not seek to impede by litigation or other means the Commission's efforts to gather information under subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Part 210.

5. SAN understands and acknowledges that if the Commission enters this Consent Order, SAN will have waived its right to introduce evidence, cross-examine witnesses, and otherwise participate in the investigation in any fashion.

6. SAN shall be excluded from any further remedial action taken by the Commission in this investigation. If a General Exclusion Order for the SUBJECT CEE PRODUCT or any of the other products that are the subject of the Complaint in this investigation is issued by the Commission, SAN will be subject to this Consent Order and will not be part of and will be excluded from said General Exclusion Order. Nothing in

this Consent Order, however, shall be construed as precluding further remedial action by the Commission in this investigation, including the grant of a General Exclusion Order covering all products that are not subject to this Consent Order.

7. The entry of this Consent Order does not constitute a determination as to a violation of 19 U.S.C. § 1337 by SAN.

8. This investigation is hereby terminated with respect to SAN, and SAN is hereby dismissed as a named respondent in this investigation; provided, however, that enforcement, modification, or revocation of this Consent Order shall be carried out pursuant to subpart I of the Commission's Rules of Practice and Procedure, 19 C.F.R. Part 210. In determining whether SAN is in violation of this Consent Order, the Commission may infer facts adverse to SAN if SAN fails to provide adequate or timely information. The Commission may impose upon any person who violates this Consent Order a penalty of not more than the greater of \$100,000 or twice the domestic value of any articles entered or sold for each day on which the Consent Order is violated. The Commission's assessment of any such penalty shall have the force of a judgment and liability for payment of such penalty shall accrue upon administrative assessment by the Commission.

9. SAN shall report to the Commission the quantity and value in dollars of the SUBJECT CEE PRODUCT that SAN has imported or sold after importation into the United States during the reporting periods below and the quantity of reported SUBJECT CEE PRODUCT that remains in inventory at the end of the reporting periods.

Any failure to make the required report or the filing of any false or inaccurate report shall constitute a violation of this Consent Order.

10. For purposes of this reporting requirement, the reporting period shall commence on January 1 of each year, and shall end on the subsequent December 31. However, the first report required under this section shall cover the period from the date the Consent Order is entered through December 31, 2009. This reporting requirement shall continue in force until December 31, 2012.

**BY ORDER OF THE COMMISSION**

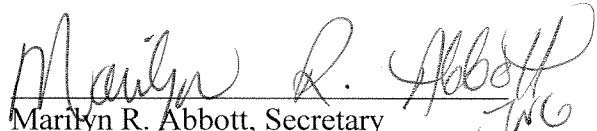
Issued: \_\_\_\_\_

\_\_\_\_\_  
Marilyn R. Abbott  
Secretary of the Commission

**IN THE MATTER OF CERTAIN PRODUCTS ADVERTISED AS 337-TA-679  
CONTAINING CREATINE ETHYL ESTER**

CERTIFICATE OF SERVICE

I, Marilyn R. Abbott, hereby certify that the attached **ORDER NO 4: / INITIAL DETERMINATION** 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 August 28, **2009**.

  
Marilyn R. Abbott, Secretary  
U.S. International Trade Commission  
500 E Street, S.W., Room 112A  
Washington, DC 20436

**FOR COMPLAINANT UNEMED CORPORATION:**

George C. Summefield, Esq.  
**STADHEIM GREAR**  
400 North Michigan Avenue  
Suite 2200  
Chicago, Ill 60611

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_

**FOR RESPONDENT SAN CORPORATION:**

Stephen L. Sulzer, Esq.  
**CONNOLLY BOVE LODGE & HUTZ LLP**  
1875 Eye Street N.W. Suite 1100  
Washington, DC 20006

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_

**RESPONDENTS:**

**BODYONICS, LTD.**  
140 Lauman Lane  
Hicksville, NY 11801

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_

**ENGINEERED SPORTS  
TECHNOLOGY, INC.**  
7217 East Colonial Drive  
Orlando, FL 32807

( ) Via Hand Delivery  
() Via Overnight Mail  
( ) Via First Class Mail  
( ) Other: \_\_\_\_\_

**IN THE MATTER OF CERTAIN PRODUCTS ADVERTISED AS 337-TA-679  
CONTAINING CREATINE ETHYL ESTER**

**PROVIANT TECHNOLOGIES, INC.**

309 West Hensley Road  
Champaign, ILL 61822

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: \_\_\_\_\_

**NRG-X LABS**

10636 West Highway 72 #1001  
Bentonville, AR

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: \_\_\_\_\_

PUBLIC MAILING LIST

Heather Hall

**LEXIS - NEXIS**

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- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
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Kenneth Clair

**THOMSON WEST**

1100 – 13<sup>th</sup> Street NW  
Suite 200  
Washington, DC 20005

- Via Hand Delivery
- Via Overnight Mail
- Via First Class Mail
- Other: \_\_\_\_\_