

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. 2: NOTICE OF GROUND RULES AND TARGET DATE AND ORDER  
SETTING DATE FOR SUBMISSION OF DISCOVERY STATEMENTS

(June 23, 2009)

Pursuant to Commission Rule 210.51(a), a target date for completion of the investigation in the above-captioned matter must be set. Upon a review of the Complaint and the Notice of Investigation, the Administrative Law Judge has determined that a target date of sixteen months from publication of the Notice of Investigation in the Federal Register<sup>1</sup> is appropriate. Accordingly, a target date of October 25, 2010<sup>2</sup> is set for this investigation.

In order that the proceeding in this matter may begin expeditiously, the parties are directed to submit a discovery statement, in regards to the full investigation, on or before August 7, 2009, which includes the following (the discovery statement need not be filed with Office of the Secretary of the Commission):

1. A description of information and evidence that each party intends to submit to prove its own case.
2. A description of specific information and evidence that each party will be seeking from other parties and third persons.

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<sup>1</sup> 74 Fed. Reg. 29,717 (June 23, 2009).

<sup>2</sup> October 23, 2010 falls on a Saturday.


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UNITED STATES INTERNATIONAL TRADE COMMISSION  
WASHINGTON, D.C. 20513

3. A description of information and evidence each party believes can be obtained only by deposition, interrogatory, subpoena, or request for admissions.

4. A proposed procedural schedule that includes dates for each of the events set forth in Ground Rule 2. Based on a review of the undersigned's current caseload and courtroom availability, the undersigned anticipates the hearing to start on January 11, 2010. The parties shall take this dates into consideration when proposing their procedural schedule.

The proposed schedule includes dates for three settlement meetings (which will not include the Administrative Law Judge) at a time, date, and location of the parties' choosing for the exploration of settlement, by persons of requisite authority, of some or all of the issues in the case. Unless the parties obtain the permission of the Administrative Law Judge, for good cause shown, the settlement meetings should **not** occur by video-conferencing or by teleconferencing. The first one of these dates should be relatively early in the investigation, the second should be approximately midway through the period for discovery, while the last should be set for the period between the close of discovery and before the commencement of the hearing. The parties should also include dates in the proposed schedule for filing the joint settlement conference reports. The parties should make intensive good faith efforts to agree to a procedural schedule. It is expected that in most instances the parties should be able to submit a joint proposal on this matter.

**SO ORDERED.**

  
Charles E. Bullock  
Administrative Law Judge

## **GROUND RULES FOR SECTION 337 INVESTIGATION**

These Ground Rules supplement the Commission's Rules of Practice and Procedure, 19 C.F.R. Parts 201 and 210 ("Commission Rules"), in order to aid the Administrative Law Judge in the orderly conduct of the Section 337 investigation pursuant to the Administrative Procedure Act, 5 U.S.C. § 556(c).

These Ground Rules govern a U.S. patent-based investigation pursuant to 19 U.S.C. § 1337(a)(1)(B). In the case of an investigation based upon a registered copyright, registered trademark, or registered mask work pursuant to 19 U.S.C. § 1337(a)(1)(B), (C) or (D), additional Ground Rules may also govern. In addition, in a case involving a motion for temporary relief pursuant to 19 U.S.C. § 1337(e), additional Ground Rules may also govern.

In case of any conflict between these Ground Rules and any subsequent order issued by the Administrative Law Judge or the Commission in this investigation, the subsequent order shall control.

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## JUDGE BULLOCK'S GROUND RULES

### 1. Address; Requirements for Filing, Service, and Copies; Time

#### 1.1 Address of Administrative Law Judge.

The Administrative Law Judge's address is as follows:

The Honorable Charles E. Bullock  
U.S. International Trade Commission  
500 E Street, S.W., Room 317  
Washington, D.C. 20436

#### 1.2 Filing Requirement.

All submissions shall be filed with the Office of the Secretary of the Commission in accordance with Commission Rules 201.15 and 210.4(f)(2) unless otherwise specifically provided for in these Ground Rules or by order of the Administrative Law Judge.

#### 1.3 Service Copy Requirements.

In accordance with the requirements of Commission Rules 210.4(f)(2) and (g), copies of each submission shall be served on all other parties, including the Commission Investigative Attorney. Also, **two** courtesy paper copies of each submission (excluding subpoenas, as noted in **Ground Rule 4.6.1**) shall be submitted to the Administrative Law Judge at the address listed in **Ground Rule 1.1** on the same day that the submission is filed. In addition, a courtesy electronic copy in Word, WordPerfect, or PDF format, excluding attachments such as exhibits, shall be sent to the Administrative Law Judge's attorney-advisor, Jennifer Whang, at the following e-mail address: Jennifer.Whang@usitc.gov.

#### 1.4 Word Processor Copy.

In the case of any filing of 25 pages or more (excluding attachments), or in the case of any filing that contains lengthy quotations from a patent, transcript, treatise or other document, the courtesy paper copies delivered to the Administrative Law Judge shall, if possible, be accompanied by an electronic version of the filing in Microsoft Word or WordPerfect.

#### 1.5 Submission by Fax Disfavored.

Submissions to the Administrative Law Judge by fax are **strongly disfavored** and are not to be made without his prior approval.

**1.6 Concurrent Service.**

Parties are encouraged to agree upon a method of service so that the parties will receive all submissions at the same time the submissions are received by the Commission.

**1.7 Computation of Time.**

In addition to the requirements of Commission Rules 201.14, 201.16(d) and 210.6 for computation of time, if the last day of the period of time for making a submission falls on a day on which weather or other conditions have made the Office of the Secretary of the Commission inaccessible, the period shall run until the end of the next business day which is not one of the aforementioned days.

**1.8 Request for Extension of Time.**

Any request for extension of time must be made by written motion the day before the due date and good cause for such extension must be established.

**2. Procedural Schedule**

The Administrative Law Judge will promulgate a procedural schedule for the investigation. Modifications of the procedural schedule by any party shall be made by written motion showing good cause. The event and deadline dates in the procedural schedule will generally adhere to the following chronological order:

First settlement conference
Submission of first settlement conference joint report
File identification of expert witnesses, including their expertise and curriculum vitae
Second settlement conference
Submission of second settlement conference joint report
File notice of prior art
Exchange of initial expert reports (identify tests/surveys/data)
File tentative list of witnesses a party will call to testify at the hearing, with an identification of each witness' relationship to the party
Exchange of rebuttal expert reports

Fact discovery cutoff and completion
Deadline for motions to compel discovery
Expert discovery cutoff and completion
Third settlement conference
Submission of third settlement conference joint report
Deadline for filing summary determination motions
Exchange of exhibit lists among the parties
Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Complainant(s) and Respondent(s)
Submit and serve direct exhibits (including witness statements), with physical and demonstrative exhibits available -- Staff
File pre-trial statements and briefs -- Complainant(s) and Respondent(s)
File requests for receipt of evidence without a witness
File objections to direct exhibits (including witness statements)
Submit and serve rebuttal exhibits (including witness statements), with rebuttal physical and demonstrative exhibits available -- all parties
Deadline for motions <i>in limine</i>
File pre-trial statement and brief -- Staff
File responses to objections to direct exhibits (including witness statements)
File objections to rebuttal exhibits (including witness statements)
File high priority objections statement
File responses to objections to rebuttal exhibits (including witness statements)
File responses to high priority objections statement
File responses to motions <i>in limine</i>

Tutorial on technology (if necessary)
Pre-trial conference
Trial
File initial post-trial briefs, proposed findings of fact and conclusions of law, and final exhibit lists
File reply post-trial briefs, objections and rebuttals to proposed findings of fact
Initial Determination due
Target date for completion of investigation

### **3. Motions; Deadlines for Responses**

#### **3.1 Contents; In General.**

All written motions shall consist of: (1) the motion; (2) a separate memorandum of points and authorities in support of the motion;<sup>1</sup> (3) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (4) a Certificate of Service as required by Commission Rule 201.16(c). All responses to motions shall consist of: (1) a memorandum of points and authorities in response to the motion; (2) an appendix of declarations, affidavits, exhibits, or other attachments in support of the memorandum of points and authorities; and (3) a Certificate of Service as required by Commission Rule 201.16(c).

#### **3.2 Contents; Certification.**

All motions shall include a certification that the moving party has made reasonable, good-faith efforts to contact and resolve the matter with the other parties **at least two business days** prior to filing the motion, and shall state, if known, the position of the other parties on such motion.

#### **3.3 Contents; Motion for Summary Determination.**

In addition to the foregoing requirements for all motions, motions for summary determination shall be further accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue and which entitle the moving party to a summary determination as a matter of law. The statement shall consist of short numbered paragraphs with specific references to supporting declarations, affidavits or other materials.

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<sup>1</sup> For procedural motions, such as motions for extensions of time, a separate memorandum is not necessary.

### **3.4 Contents; Response to Motion for Summary Determination.**

In addition to the foregoing requirements for all responses to motions, each party opposing a motion for summary determination shall append to the response a separate statement responding individually to the numbered paragraphs of the motion statement required by **Ground Rule 3.3** with which the party disagrees, with specific references to supporting declarations, affidavits or other materials. The responsive statement shall also include any similarly numbered paragraphs of additional facts, similarly referenced and supported, which the opposing party believes warrant denial of summary determination. All material facts set forth in the moving party's statement may be deemed admitted by a nonmoving party unless so specifically controverted in the nonmoving party's responsive statement.

### **3.5 Contents; Discovery-Related Motions.**

Any discovery-related motion must have appended to it the pertinent parts of the discovery request and all objections and answers thereto. Additionally, if a party serves supplemental responses subsequent to the filing of a motion to compel, that party must provide copies of the supplemental responses, or where documents are produced, a detailed accounting of what additional documents were produced.

### **3.6 Deadline for Filing Response to Motion.**

In addition to the requirements of Commission Rules 201.16 and 210.15(c) governing the time period for a nonmoving party's response to a written motion, the date of service of a motion on a nonmoving party by electronic mail, hand-delivery or by an express-type mail or courier service is the date of delivery. The additional time provided under Commission Rule 201.16(d) after service by mail does not apply in such instances, unless service by electronic mail, hand-delivery or by an express-type mail or courier service is to a nonmoving party in a foreign country, in which event the additional time allowed for responses to motions shall be **five (5) days**.

### **3.7 Request for Shortened Time to Respond to Motion.**

A motion shall include any request to shorten the period of time during which other parties may respond to the motion. The fact that a shortened response time is requested shall be noted in the title of the motion and the motion shall include an explanation of the grounds for such a request. A request for a shortened response time shall not be made through a separate motion.

### **3.8 No Motion Stops Discovery Except Motion to Quash Subpoena.**

No motion stops discovery except a timely motion to quash a subpoena.

#### **4. Discovery**

##### **4.1 Resolution of Disputes; Coordinated Discovery.**

All parties shall make reasonable efforts to resolve among themselves disputes arising during discovery. Parties with similar interests must coordinate and consolidate depositions and all other discovery.

##### **4.1.1 Discovery Committee**

Commencing with the first full week after these Ground Rules are issued, a discovery conference committee (the "Discovery Committee") consisting of the lead counsel of each party and the Commission Investigative Staff Attorney shall convene at least once every two weeks during the discovery phase of this investigation, either in person or by telephone, to resolve discovery disputes. The Discovery Committee shall confer in good faith to resolve every outstanding discovery disputes in a timely manner within the deadlines set forth in the Procedural Schedule. Within ten calendar days after the end of each calendar month during the discovery phase, the Discovery Committee shall report in writing to the Administrative Law Judge all disputes that were resolved during the preceding month and all disputes on which there is an impasse as of the end of that month. No motion to compel discovery may be filed unless the subject matter of the motion has first been brought to the Discovery Committee and the Committee has reached an impasse in resolving the matter.

##### **4.2 Stipulations Regarding Discovery Procedure.**

Unless otherwise directed by the Administrative Law Judge, the parties may by written stipulation (1) provide that depositions may be taken before any person, at any time or place, upon any notice, and in any manner and when so taken may be used like other depositions, and (2) modify other procedures governing or limitations placed upon discovery, except that stipulations extending the time provided in **Ground Rules 4.4.2, 4.4.3 and 4.4.4** for responses to discovery may, if they would interfere with the target date of the investigation or with any time set in the procedural schedule or in an order for completion of discovery, for hearing of a motion, or for the trial, be made only with the approval of the Administrative Law Judge upon a written motion showing good cause.

##### **4.3 Service of Discovery Requests and Responses.**

Discovery requests and responses thereto shall be served upon all parties, including the Commission Investigative Attorney, but shall not be served on the Administrative Law Judge unless they are pertinent to a motion. Discovery documents need not be served on the Office of the Secretary of the Commission unless they are appended to motions.

#### **4.4 Timing of Discovery Requests, Responses and Objections.**

##### **4.4.1 Depositions; Notice.**

In addition to the requirements of Commission Rule 210.28(c), unless otherwise ordered, any party desiring to take a deposition shall give notice in writing to every other party of not less than **ten (10) days** if the deposition is to be taken of a person located in the United States, or of not less than **fifteen (15) business days** if the deposition is to be taken of a person located outside the United States.

##### **4.4.2 Interrogatories; Deadline for Responses and Objections.**

In addition to the requirements of Commission Rule 210.29(b), unless otherwise ordered, the party upon whom interrogatories have been served shall serve a copy of the answers, and any objections, within **ten (10) days** after the service of the interrogatories.

##### **4.4.3 Requests for Production of Documents or Things or for Entry Upon Land; Deadline for Responses and Objections.**

In addition to the requirements of Commission Rule 210.30(b)(2) with respect to a request for the production of documents or things, or to permit entry upon land, unless otherwise ordered, the party upon whom a request has been served shall serve a written response within **ten (10) days** after the service of the request.

##### **4.4.4 Request for Admission; Period for Service; Deadline for Responses and Objections.**

In addition to the requirements of Commission Rule 210.31(a) and (b), unless otherwise ordered, a request for admission may be served at anytime **twenty (20) days** after the date of service of the complaint and notice of investigation. Unless otherwise ordered, a party upon whom a request for admission has been served, shall serve an answer or objection within **ten (10) days** after the service of the request, otherwise the matter may be deemed admitted.

##### **4.4.5 Discovery Cutoff and Completion.**

All discovery requests, including without limitation requests for admissions, must be initiated in sufficient time prior to the fact discovery cutoff and completion date so that the responses will be due prior to that date within the time periods set forth above. Discovery requests by any party that would require responses after the fact discovery cutoff and completion date must be approved in advance by the Administrative Law Judge upon a showing of compelling circumstances.

#### **4.5 Interrogatory Limitation.**

Without leave of the Administrative Law Judge or written stipulation, any party may serve upon any other party written interrogatories not exceeding 175 in number including all discrete subparts. Leave to serve additional interrogatories shall be granted by the Administrative Law Judge only upon a written motion showing good cause.

#### **4.6 Subpoenas.**

##### **4.6.1 Issuance and Service.**

Subpoenas under Commission Rule 210.32 shall follow form (samples attached in **Appendix A** hereto). Applications for issuance of a subpoena shall be submitted to the office of the Administrative Law Judge (courtesy copies are not required), and the application shall identify the relation of the subpoena recipient and the requested information to the investigation. Upon issuance of the subpoena, the subpoena applicant shall serve a copy of the subpoena on each of the other parties to the investigation.

##### **4.6.2 Motion to Quash Subpoena; Deadline.**

In addition to the requirements of Commission Rule 210.32(d), any motion to limit or quash a subpoena shall be filed within **ten (10) days** after receipt thereof, or within such other time as the Administrative Law Judge may allow.

#### **4.7 Bates Numbering.**

If documents produced by any supplier in response to a document request are furnished to the requester as copies of original documents, every page of every such document shall be numbered sequentially by a unique number (commonly known as a "Bates number"). The Bates number shall appear stamped on the lower right-hand corner of the page.

#### **4.8 Translations.**

All documents produced in response to a document request shall be the original or true complete copies of originals. If an English translation of any document produced exists, the English translation shall be produced.

#### **4.9 Confidential Submissions.**

The confidential nature of any filing with the Office of the Secretary of the Commission or of any submission to the Administrative Law Judge shall be conspicuously noted on the top page of any filing or other submission. No cover letter or other document shall be stapled or otherwise attached to a filing or other submission so as to obscure the confidential marking on the top page.

#### **4.10 Privileged Matter.**

In order to expedite discovery, the following procedure shall be followed with respect to those documents for which counsel claims privilege (attorney-client or work product).

##### **4.10.1 Privileged Document List.**

If production of any document is withheld on the basis of a claim of privilege, each withheld document must be separately identified via a privileged document list.<sup>2</sup> The privileged document list shall be supplied, unless otherwise ordered, within **ten (10) days** after objections based on privilege to the underlying document requests are due. The privileged document list must identify each document separately, specifying for each document at least the following: (1) the date; (2) the author(s)/sender(s); (3) the recipient(s), including copy recipient(s); and (4) the general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or associated. If the author/sender or recipient is an attorney or foreign patent agent, he or she shall be so identified. The type of privilege claimed must also be stated, together with certification that all elements of the claimed privilege have been met and not waived with respect to each document.

##### **4.10.2 Motion to Compel Production of Privileged Matter.**

Any party seeking production of allegedly privileged documents shall file an appropriate motion only after examining the privileged document list.

The Administrative Law Judge is aware that, often times, parties agree that production of a privilege log is not necessary. The Administrative Law Judge finds such an agreement to be acceptable; however, if such an agreement is in force, the Administrative Law Judge will not consider any motions involving privileged documents.

#### **5. Notice of Prior Art**

Parties must file on or before the date set in the procedural schedule, notices of any prior art consisting of the following information: country, number, date, and name of the patentee of any patent; the title, date and page numbers of any publication to be relied upon as anticipation of the patent in suit; or as showing the state of the art, and the name and address of any person who may be relied upon as the prior inventor or as having prior knowledge of or as having previously used or offered for sale the invention of the patent in suit.

If a trademark is involved, the parties must file on or before the date set in the procedural schedule, notices of any art on which a party will rely at the hearing regarding the functionality or

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<sup>2</sup> See *Duplan Corp. v. Deering Millikin, Inc.*, 397 F. Supp. 1146, 184 U.S.P.Q. 775 (D.S.C. 1974).

non-functionality of any trademarks at issue.

In the absence of such notice, proof of the said matters may not be introduced into evidence at the trial except upon a timely written motion showing good cause.

#### **5A. *Markman* Hearing on Claim Construction**

If the undersigned determines that a *Markman* hearing would be beneficial to the investigation, the undersigned may conduct a *Markman* hearing on the date set forth in the procedural schedule for the purpose of construing any disputed claim terms of the patents at issue in the investigation. The parties and Commission Investigative Staff shall meet and confer on these issues no later than ten (10) days before the *Markman* hearing in order to reduce the number of disputed claim terms to a minimum. Before the *Markman* hearing, Complainant(s), Respondent(s) (if there is more than one Respondent, they are required to file a joint brief), and Staff shall file with the Administrative Law Judge, by the date set forth in the procedural schedule, a short written statement of its interpretation of each of the remaining disputed claim terms together with its support for each interpretation as a matter of ordinary meaning, or as derived from the claims, specification, or prosecution history of the patent(s) at issue, or from extrinsic evidence.<sup>3</sup> If there are multiple patents at issue, the brief should be organized by patent, similar to the outline for post-trial briefs (see Appendix B). Rebuttal briefs may also be filed by the date set forth in the procedural schedule. After the *Markman* hearing, the parties shall submit a joint chart, by the date set forth in the procedural schedule, setting forth their post-hearing constructions. Afterwards, the Administrative Law Judge will issue an order construing the disputed claims for the purposes of this Investigation. Thereafter, discovery and briefing in this investigation shall be limited to that claim construction.

#### **6. Expert Witnesses and Reports**

On or before the dates set forth in the procedural schedule, a party shall disclose to other parties the identity of any person who is retained or employed to provide expert testimony at the trial and shall provide to the other parties a written report prepared and signed by the witness. The report shall not be filed with the Office of the Secretary of the Commission. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years. The parties shall supplement these disclosures as needed in the manner provided in Commission Rule 210.27(c).

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<sup>3</sup> See *Invitrogen Corp. v. Biocrest Mfg., L.P.*, 327 F.3d 1364, 1367 (Fed. Cir. 2003); *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 979-81 (Fed. Cir. 1995), *aff'd* 517 U.S. 370 (1996).

## 7. Settlement

All parties, throughout the duration of the proceedings, shall explore reasonable possibilities for settlement of all or any of the contested issues. All parties shall certify in their pre-trial statements that good faith efforts were undertaken to settle the remaining issues. Additionally, for each of the required settlement conferences provided for in the procedural schedule, the parties shall provide the Administrative Law Judge with two copies of a joint report signed by all the parties setting forth any stipulations on which the parties have agreed. These reports are due by the time designated in the procedural schedule or within such other time as the Administrative Law Judge may allow. The reports shall not be filed with the Office of the Secretary of the Commission.

## 8. Pre-trial Submissions

### 8.1 Pre-trial Statement.

Each party who desires to participate in the trial in this investigation must file on or before the date set forth in the procedural schedule a pre-trial statement containing the following information:

- (a) The names of all known witnesses, their addresses, whether they are fact or expert witnesses (and their area of expertise), and a brief outline of the testimony of each witness. In the case of expert witnesses, a copy of the expert's curriculum vitae shall accompany this submission.
- (b) A list, by title and number, of all exhibits which the parties will seek to introduce at the trial. The list shall include five columns. In the first four columns, the party shall include the number of the exhibit, a brief description/title of the exhibit, the purpose for which it is being offered, and the sponsoring witness(es). The last column shall be labeled "Received", and need only include sufficient space for a date.
- (c) A list of any stipulations on which the parties have agreed.
- (d) A proposed agenda for the pre-trial conference.
- (e) Estimated date and approximate length for appearance of each witness (The parties shall confer on estimated dates and approximate length prior to submission of their pre-trial statements).
- (f) Certification regarding good faith efforts to settle.

### 8.2 Pre-trial Brief.

On or before the date set forth in the procedural schedule, each party shall file a pre-trial brief. The pre-trial brief shall be prefaced with a table of contents and a table of authorities. The pre-trial brief shall set forth **with particularity** a party's contentions on each of the proposed issues, including citations to legal authorities in support thereof, and shall conform to the general outline set forth in **Appendix B** hereto. All issues, including issues not specifically named in the general outline that any party seeks to address, shall be inserted into the general outline where appropriate. The parties shall meet and confer as needed prior to filing the pre-trial briefs in order to determine

appropriate common locations for each issue in the foregoing outline of every pre-trial brief. The parties shall provide complete proposed claim construction for all patent claims at issue. Any contentions not set forth in detail as required herein shall be deemed abandoned or withdrawn, except for contentions of which a party is not aware and could not be aware in the exercise of reasonable diligence at the time of filing the pre-trial brief.

## **9. Trial Exhibits**

### **9.1 Material To Be Received Into Evidence.**

Only factual material and expert opinion shall be received into evidence. Legal argument shall be presented in the briefs.

### **9.2 Legal Experts.**

Legal experts may only testify as to procedures of the U.S. Patent and Trademark Office.

### **9.3 Witness Testimony.**

All direct witness testimony, with the exception of adverse witnesses, shall be made by witness statements in lieu of live testimony. Staff may, however, ask the witness supplemental direct testimony on the witness stand. Witness statements shall be marked and offered into evidence as exhibits and witnesses shall be available for cross-examination on the witness stand unless waived. Witnesses will not read their prepared testimony into the record.

A witness statement shall be in the form of numbered questions from counsel, with each question followed by the witness's own answer to that question, and with the final question from counsel asking the witness whether or not the witness statement contains the witness's answers to the questions from counsel, followed by the witness's answer to this question and the witness's signature. The witness statement shall be assigned an exhibit number and each question shall be numbered consecutively.

A witness statement shall be in the language of the witness, and a foreign language witness statement shall be accompanied by a certified translation thereof.

### **9.4 Exhibits.**

#### **9.4.1 Exchange of Proposed Exhibits Among Parties.**

Copies of documentary proposed exhibits, along with a proposed exhibit list shall be served on the opposing parties (including the Commission Investigative Attorney) *at least one week before* the date ordered in the procedural schedule. Once the parties have exchanged their proposed exhibit lists, they shall eliminate any duplicative exhibits or renumber such exhibits as joint exhibits and

update their exhibit lists before they are submitted to the undersigned by the due date in the procedural schedule. Proposed physical and demonstrative exhibits need not be served, but shall be identified in the proposed exhibit list. Proposed physical and demonstrative exhibits, however, must be made available for inspection by the other parties on the date established for the submission and service of proposed exhibits. Proposed exhibits shall not be filed with the Office of the Secretary of the Commission.

#### **9.4.2 Service of Proposed Exhibits Upon Administrative Law Judge.**

On the date that is set forth in the procedural schedule, the Administrative Law Judge shall receive a set containing each proposed exhibit in an individual folder (which will be used for scanning purposes),<sup>4</sup> another full set of proposed exhibit copies in loose-leaf binders (which will be used by the Administrative Law Judge during and after the hearing), and an electronic pdf version of all proposed exhibits, along with a proposed exhibit list. Clear photocopies may be used instead of original documents.

#### **9.4.3 Format of Original and Binder Exhibit Sets.**

In order to facilitate the optical scanning of the exhibits, the exhibits in the original set shall consist of loose sheets (which may be clipped but not stapled) in folders (file folders, accordion folders, etc.) that are provided in sequentially-numbered boxes. Each folder must be labeled to reflect the number of the exhibit contained therein, *e.g.*, RX-14C. In each of the boxes of the original exhibit set, the folders containing the exhibits shall be placed in numerical order. Alternatively, parties may submit this set of exhibits electronically, in accordance with **Ground Rule 9.4.15**.

The exhibits in the binder sets shall be individually tabbed, with each tab reflecting the number of the corresponding exhibit, *e.g.*, CX-3C. Each binder must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, *e.g.* Complainant's Exhibits CX-1 through CX-18C.

#### **9.4.4 Maintenance and Filing of Final Exhibits and Final Exhibit List.**

Each party must submit a final exhibit list prepared in accordance with **Ground Rule 9.4.7** reflecting the status of all exhibits, including those admitted and rejected during the trial on the same date that the post-hearing briefs are due. Any withdrawn exhibit shall be identified on the final exhibit list only by exhibit number and shall indicate that it is withdrawn.

The parties are responsible during the course of the trial for updating the exhibit lists and for maintaining and updating the original set of exhibits, which shall become the set that is filed with the Commission after the record is closed, as well as for confirming that all admitted and rejected exhibits are included among the Commission exhibits and the final exhibit list at the conclusion of

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<sup>4</sup> In the alternative, parties may submit the original folder set electronically pursuant to **Ground Rule 9.4.15**.

the trial. Any exhibits that are not included with the Commission exhibits and the final exhibit list at the conclusion of the trial will not be considered as part of the record to be certified to the Commission when the final initial determination issues. Alternatively, parties may submit this set of exhibits electronically, in accordance with **Ground Rule 9.4.15**.

In addition, no later than thirty (30) days after the submission of post-trial reply briefs, each party shall deliver one additional binder set of copies of all except withdrawn exhibits to the Administrative Law Judge along with a final exhibit list, with rejected exhibits submitted under separate cover and so marked. This additional binder set is for use by the Office of General Counsel.

#### **9.4.5 Numbering and Labeling of Exhibits.**

Written exhibits shall be marked serially commencing with the number "1" and preceded by the prefix "CX" for Complainant's exhibits, "RX" for Respondent(s)' exhibits, "SX" for the Commission Investigative Attorney's exhibits, and "JX" for any joint exhibits. The parties shall not "reserve" numbers, but instead shall assign all numbers in consecutive sequence.

If an exhibit contains confidential business information a "C" shall be placed after the exhibit number. Furthermore, exhibits containing confidential business information shall be so designated pursuant to the Protective Order. In addition, on any exhibit list submitted, exhibits which contain confidential business information shall be denoted by placing a "C" after the exhibit number in the listing. No exhibit list shall contain confidential information; all exhibits lists shall be public documents.

Each exhibit shall be marked by placing a label bearing the exhibit's number (*e.g.*, CX-3C or RX-5) in the upper right portion of the exhibit's first page. Further, the pages of each exhibit must be sequentially numbered in a consistent location on the pages.

Respondent(s) shall coordinate their numbering to avoid duplication in numbering. Additionally, the parties shall coordinate exhibits to avoid unnecessary duplication (*e.g.*, patents; file wrappers). *See Ground Rule 9.4.1*. Further, all exhibits or copies of exhibits shall be clear and legible. Lastly, each exhibit may be assigned no more than one number.

Physical exhibits shall be numbered in a separate series commencing with "1" preceded by the prefixes "CPX", "RPX", "SPX" and "JPX", for Complainant, Respondent, the Commission Investigative Attorney, and joint exhibits, respectively. Confidential exhibits shall be denoted with the letter "C" as in the case of documentary exhibits.

Demonstrative exhibits shall be numbered in a separate series commencing with "1" preceded by the prefixes "CDX", "RDX", and "SDX", for Complainant, Respondent(s), and the Commission Investigative Attorney, respectively. Confidential exhibits shall be denoted with the letter "C". Additionally, the parties shall provide the Administrative Law Judge with two (2) copies of key demonstrative exhibits (*e.g.*, charts, drawings, etc.) reduced to 8 ½ inches x 11 inches.

#### **9.4.6 Public and Confidential Exhibits.**

If any portion of an exhibit contains confidential business information, the entire exhibit shall be treated as confidential. For certain lengthy exhibits of which only portions are confidential, the parties may be asked to submit a public version of the exhibit. In the original exhibit set only, confidential exhibits and public exhibits shall be placed in separate boxes which are clearly marked as containing either confidential or public exhibits. Because public and confidential exhibits are to be placed in separate boxes, numerical gaps may appear in each box, *e.g.*, the public box may contain exhibits CX-1, CX-2 and CX-4, while the confidential box contains CX-3C and CX-5C. Alternatively, parties may submit this set of exhibits electronically, in accordance with **Ground Rule 9.4.15**. In that case, separate discs shall be submitted for public and confidential exhibits.

The exhibits in the binder sets shall be in consecutive numerical order, and shall **not** be separated according to confidential or public status.

#### **9.4.7 Exhibit Lists.**

Every exhibit list shall consist of a table enumerating all exhibits serially by exhibit number and identifying each exhibit by a descriptive title, a brief statement of the purpose for which the exhibit is being offered in evidence, the name of the sponsoring witness, and the status of receipt of the exhibit into evidence. In the case of joint exhibits, every exhibit list shall identify such exhibits, and the parties shall meet and confer before submitting the lists to agree upon a common descriptive title, statement of purpose, and sponsoring witnesses that shall appear on every list for each joint exhibit (*see Ground Rule 9.4.1*). In any exhibit list submitted prior to the offer of any exhibit into evidence, the entry in the column for the status of receipt shall be left blank. In any exhibit list submitted after the exhibit is offered into evidence or withdrawn, the entry in that column shall show the date of admission into evidence or rejection of the exhibit or shall indicate its withdrawal.

Exhibit lists shall include public and confidential exhibits, and shall list all exhibits together in numerical order, *e.g.*, CX-1, CX-2, CX-3C, CX-4, CX-5C, etc.

#### **9.4.8 Foreign Language Exhibits.**

No foreign language exhibits will be received into evidence unless a translation thereof is provided at the time set for the exchange of exhibits. The translation shall be included as part of the foreign language exhibit.

#### **9.4.9 One Document Per Exhibit; All Pages Bates-numbered.**

Except for good cause shown, each exhibit shall consist of no more than one document and every page of every document shall be Bates numbered in accordance with **Ground Rule 4.7** above. Exceptions to this “one document per exhibit” rule include instances when it would be appropriate to group certain documents together as one exhibit, such as a group of invoices or related e-mails.

#### **9.4.10 Witness Exhibit Binder.**

In examining witnesses on direct with prepared written testimony, counsel shall provide the witness, the Administrative Law Judge, and other counsel, just prior to the commencement of the examination of each witness, with a binder containing only the witnesses' prepared written testimony, along with a table of all exhibits referred to within the prepared written testimony along with a blank column entitled "Received Into Evidence" or having similar language.

In examining adverse witnesses who have not prepared written testimony, or cross-examining witnesses, counsel shall provide the witness, the Administrative Law Judge, and other counsel, just prior to the commencement of the examination of each witness, with a binder containing all exhibits, in numerical order, and individually tabbed, to be used in the examination of the witness. Each binder must be labeled on its spine with the name and number of the investigation and the nature of the contents of the binder, e.g. Cross-Examination of Witness - Volume 1 of 1. In addition, the front of the witness binder must include a table of all exhibits to be used in the examination of the witness with a blank column entitled "Received Into Evidence" or having similar language.

If there are certain exhibits (*i.e.* patent, prosecution histories) that will be used frequently with more than one witness, a separate exhibit binder containing those exhibits may be used with those witnesses and do not have to be included in the separate witness binder for each witness.

#### **9.4.11 References for Exhibit.**

If it is appropriate, exhibits shall cite sources of information and methods employed in formulating accounting, economic or other types of data. Rebuttal exhibits, if submitted, shall refer specifically to exhibits being rebutted.

#### **9.4.12 Authenticity.**

All documents that appear to be regular on their face shall be deemed authentic, unless it is shown by particularized evidence that the document is a forgery or is not what it purports to be.

#### **9.4.13 Sponsoring Witness.**

Each exhibit that is offered into evidence shall have a "sponsoring witness." One of the purposes of having a sponsoring witness associated with an exhibit is to establish a foundation for the exhibit and to prevent exhibits from coming into the record that have no explanation regarding it. Sponsoring witness testimony does not necessarily have to be in the form of live testimony if all parties (Complainant(s), Respondent(s) and Staff) are in agreement to allow otherwise. For example, if parties are willing to stipulate and agree to designate portions of deposition testimony into the record in lieu of live testimony, along with certain exhibits that were discussed during the deposition, such request will generally be permitted, as long as the exhibit was clearly identified and discussed during the deposition and that the deposition pages discussing the exhibit are included in the

designation.

Except in an investigation in which there is no participating Respondent, if a party believes evidence to be non-controversial and to be appropriate for receipt in evidence without a sponsoring witness, that party may present with each such exhibit on or before the due date set forth in the procedural schedule: (1) an affidavit or declaration that the declarant prepared or someone under the declarant's direction prepared the exhibit; (2) a request that the exhibit be received in evidence without a witness at the trial; and (3) a statement of grounds for receiving the exhibit in evidence without a witness at the trial. Any party who wishes to cross-examine the declarant may object in writing within **three (3) days** of service of the affidavit or declaration and request, specifying whom the party intends to examine. In the absence of objections, and upon good cause shown, the exhibit shall be received in evidence without a witness subject to the right of objection on other grounds.

#### **9.4.14 High Priority Objections for Pre-trial Conference.**

Each party's objections to rebuttal and/or supplemental exhibits shall be accompanied by another submission listing and providing a narrative explanation of the objections to exhibits which the party believes to be of high priority for discussion and/or ruling at the pre-trial conference. The objections placed on the high priority list may be taken from the party's objections to direct, rebuttal and/or supplemental exhibits. No party shall place more than ten objections on the high priority list.

#### **9.4.15 Filing of Exhibits by CD/DVD Media**

##### **9.4.15.1 Introduction**

This ground rule defines the technical requirements which must be met in order to submit post-hearing exhibits via electronic media, rather than as paper copies. A party may still choose to submit the Dockets exhibit set in folder format as described in **Ground Rule 9.4.3** (the original set). This is an additional option for parties to submit their Dockets exhibit set in electronic format; however, this is not a requirement, only an option.

On the same day that the initial post-hearing briefs are due, the exhibits shall be separated into: 1) Admitted Confidential; 2) Admitted Public; 3) Rejected Confidential; and 4) Rejected Public. Withdrawn exhibits are not to be submitted with the Dockets Exhibits Set (as explained in **Ground Rule 9.4.4**). Two sets of four CDs/DVDs or sets of CDs/DVDs shall be submitted to the Administrative Law Judge, with each CD or DVD being labeled as to what type of exhibits it contains (Admitted Confidential, Admitted Public, Rejected Confidential, Rejected Public). One set of CDs/DVDs will be forwarded to Dockets by the Administrative Law Judge, while the other set will be used by the Administrative Law Judge and/or forwarded to the Office of General Counsel when the initial determination is issued. The Rejected Exhibits will not be entered into the EDIS system but will be retained with the official record. Listed below are the ground rules specifying the technical requirements which firms must adhere to in order to submit post-hearing exhibits in electronic form.

#### 9.4.15.2 Rules for Preparing Exhibit Files to be Submitted:

The following rules are laid forth for preparing the Dockets set of Exhibits as defined in **Ground Rule 9.4.3 and 9.4.4.** (the original or Commission set of exhibits).

- (1) All files submitted as exhibits on the media must be in PDF format version 1.3 or higher. (Recommendation: Use Adobe Acrobat 7 Professional for conversion.)
- (2) PDF size must be <10 MB in size. Files larger than 10 MB must be broken into individual parts which are less than 10 MB. (Recommendation: use ≤ 300 DPI on images inserted into documents.)
  - (a) If a file must be broken into individual parts, name the files in accordance with the standard naming convention set out in the Ground Rules, followed by the part number (*e.g.*, CX-1 part 1; CX-1 part 2, etc.).

- (3) The following conversion settings should be used when converting files from standard word processing software to PDF format:

Converting Microsoft Word files to PDF (Adobe PDF → Change Conversion Settings):

Settings tab:

Required:

- a. Uncheck option “Attached source file to Adobe PDF”
- b. Uncheck option “Add bookmarks to Adobe PDF”
- c. Uncheck “Add links to Adobe PDF”

Recommended:

- d. Check “Enable accessibility and reflow with Tagged PDF” (enables Section 508 compliance capabilities)
- e. Set compatibility to Acrobat 6 (PDF 1.5) (Advanced Settings → Compatibility)

Security tab:

Required:

- f. Uncheck “Require a password to open the document”

Converting files from WordPerfect to PDF (File → Publish to PDF → Document):

Required:

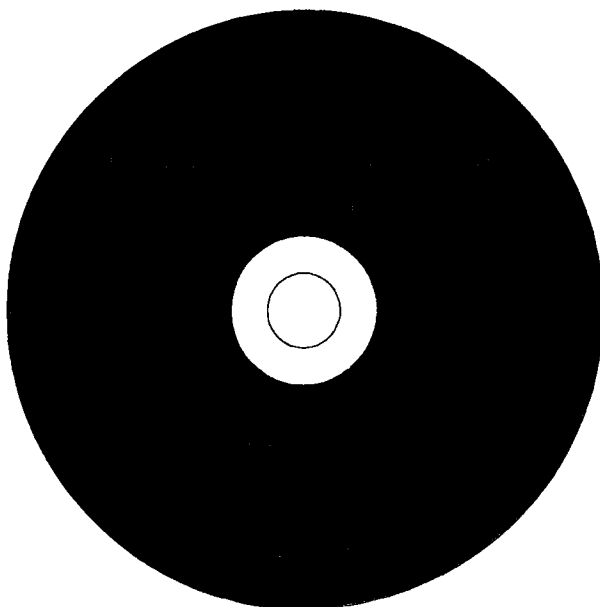
- a. Uncheck “Include hyperlinks”
- b. Uncheck “Generate bookmarks”

- (4) All files must have password protection disabled.
- (5) An Optical Character Recognition (OCR) should be run on each file containing text. Once the PDF is created, run Document → Recognize Text using OCR, to extract any words that could be readable by a search engine.
- (6) Each file should be named for the exhibit it contains, conforming to the rules set forth in **Ground Rule 9.4.5.**

### 9.4.15.3 Preparing the Electronic Media

All exhibit files created following the rules defined above must be transferred to electronic media following the guidelines defined below:

- (1) All files for each category of exhibits must be copied onto separate DVD+R or CD media. Four separate DVDs/CDs or four separate sets of DVDs/CDs should be submitted, each one only containing Admitted Public, Admitted Confidential, Rejected Public or Reject Confidential files.
  - (a) If one CD cannot hold all the exhibit files for a category, multiple CDs per category can be created, but the sequence of the CDs should be identified accordingly on the label (*e.g.*, Disc 1 of 2). However, use of a DVD is preferred in such cases.
- (2) Demonstrative Exhibits can be submitted on the same media with Hearing Exhibits, but the files should be labeled according to the defined naming conventions set forth in **Ground Rule 9.4.5** (*e.g.*, RDX-xxxx).
- (3) Animations or any type of macromedia automated presentation must be submitted separately as a physical exhibit. Animation files will not meet the PDF acceptance criteria of EDIS.
- (4) All files should be written at the root directory level of the DVD/CD. No subdirectories should be created on the disc.
- (5) A Table of Contents (TOC) file which lists the names of all files on the disc should be created and included on each disc.
- (6) Each disc should be labeled with the Investigation Number, Security Level, Document Type (*e.g.*, Admitted Post-Trial Exhibits), Party (*e.g.*, Complainant XYX Corp.), Firm (submitting the exhibits), and the Creation Date. Discs containing Confidential Business Information or Business Proprietary information should be clearly labeled as such. An example is shown below:



- (7) Each DVD/CD should be checked to ensure it has been correctly created, labeled, and contains ONLY the desired content. It is the responsibility of the parties to ensure that if confidential information is present on a DVD/CD then that DVD/CD is marked in accordance with the Protective Order.

#### **9.4.15.4 Delivery to Administrative Law Judge**

The DVDs/CDs should be delivered to the Administrative Law Judge's office on the same day that initial post-hearing briefs are due.

### **10. Trial Procedure**

#### **10.1 Trial; Order of Examination.**

The order of examination at the trial is as follows (subject to alteration at the pre-trial conference or other changes in the discretion of the Administrative Law Judge):

- (1) Brief Opening Statements
  - (a) Complainant (limited to one hour)
  - (b) Respondent (limited to one hour)
  - (c) Commission Investigative Attorney (limited to half an hour)
- (2) Complainant's Case-in-Chief.
- (3) Respondent's Case-in-Chief (In the event there is more than one respondent, the order of presentation will be determined at the pre-trial conference. Respondents where possible should avoid unnecessary duplication of effort.)
- (4) Commission Investigative Attorney's Case-in-Chief.
- (5) Complainant's Rebuttal (Complainant's rebuttal, in the discretion of the Administrative Law Judge, shall be limited to the scope of respondent's defense case.)
- (6) Respondent's Rebuttal (Respondent's rebuttal, in the discretion of the Administrative Law Judge, shall be limited to the issues for which Respondent carries ultimate burden of proof.)

#### **10.2 Closing Argument.**

The Administrative Law Judge normally does not schedule closing arguments. Parties may request closing arguments, which are to be held at the discretion of the Administrative Law Judge. Typically, such closing arguments are held after all post-hearing briefs have been submitted.

#### **10.3 Trial Hours.**

Normal trial hours are 9:00 a.m. to 4:30 p.m. with a one-hour and fifteen minute luncheon recess, beginning each day at approximately 12:15 p.m. Fifteen-minute breaks will also occur at approximately 10:45 a.m. and 3:00 p.m. each day.

## **10.4 Trial Decorum.**

### **10.4.1 Conversations at Trial.**

No cross conversation between opposing counsel will be permitted. Rather if counsel has anything to say to opposing counsel, such statement must be made through the Administrative Law Judge.

### **10.4.2 Reading Matter; Cell Phones and Beepers; Food and Beverages.**

No reading of extraneous material will be permitted in the courtroom. Audible cell phone and beeper signals shall be turned off in the courtroom during trial, and all cell phone calls must be taken outside of the courtroom. No food, gum, or beverages other than bottled water will be permitted in the courtroom during trial.

### **10.4.3 Swearing of Witnesses.**

When a witness is sworn, the witness shall remain standing. All others in the trial room must be seated and quiet.

### **10.4.4 Arguments on Objection.**

Arguments or objections may only be made by counsel prior to a ruling. Once a ruling is made, no further discussion of the matter will be permitted.

## **10.5 Examination of Witnesses.**

### **10.5.1 Scope of Examination; In General.**

Except in extraordinary circumstances, examination of witnesses for Complainant's case-in-chief and Respondent(s)' case-in-chief shall be limited to direct, cross, redirect, and re-cross.

### **10.5.2 Scope of Cross-examination.**

Cross-examination will be limited to the scope of the direct examination. For witnesses called for the purpose of giving testimony in support of a position on an issue that is the same as the position on that issue of a party desiring cross-examination of that witness, that party is precluded from asking that witness leading questions; *i.e.* "no friendly cross-examination."

When counsel is presenting a witness with a question that refers back to the witness's previous testimony, counsel shall refrain from summarizing the witness's previous testimony because this can lead to a time-consuming objection that counsel's summary was not an accurate recitation of the witness's previous testimony. If counsel wishes to refer back to a witness's previous

testimony, counsel must use direct quotations.

#### **10.5.3 Scope of Redirect and Re-cross Examination.**

Redirect examination will be limited to matters brought out on cross-examination. Re-cross examination will be limited to matters brought out on redirect examination.

#### **10.5.4 Coordination of Witnesses.**

The parties are expected to coordinate examination of witnesses so as to allot appropriate time for examination of each of the witnesses within the total time allotted for the trial.

#### **10.5.5 Documents Presented to Witnesses.**

Any document which counsel wishes to show to a witness must first be shown to opposing counsel.

#### **10.5.6 Scope of Expert Witness Testimony.**

An expert's testimony at the trial shall be limited in accordance with the scope of his or her expert report(s), deposition testimony, or within the discretion of the Administrative Law Judge.

#### **10.5.7 Coordination of Respondents' Cross-examination.**

Respondents shall coordinate cross-examination through one attorney as far as practicable to avoid duplication. If that is not possible, counsel who intends to cross-examine must be present in the trial room during the entire preceding cross-examination of the witness so as not to engage in repetitive questioning.

#### **10.5.8 Requests for Clarification of a Question.**

Requests for clarification of a question only may come from the witness or the Administrative Law Judge.

#### **10.5.9 Use of Translators.**

If a translator will be used at trial, the parties are responsible for obtaining one qualified, neutral translator upon whom counsel can agree. It is suggested that the translator be chosen from a list of approved translators, such as may be kept by various federal district courts or federal agencies. Translators will be sworn.

### **10.5.10 Conferring with Witness during a Break in Testimony**

Counsel shall not confer with a witness during a break in the witness's testimony on the witness's substantive testimony.

## **11. Post-trial Briefs and Proposed Findings of Fact and Conclusions of Law**

### **11.1 Initial Post-trial Briefs; Filing and Content.**

On or before the date set forth in the procedural schedule, the parties shall file a post-trial brief together with proposed findings of fact and brief proposed conclusions of law. In addition, each party must submit a copy of its final exhibit list with its post-trial brief and proposed findings of fact and conclusions of law. The post-trial brief shall discuss the issues and evidence tried within the framework of the general issues determined by the Commission's Notice of Investigation, the general outline of the briefs as set forth in **Appendix B**, and those issues that are included in the pre-trial brief and any permitted amendments thereto. All other issues shall be deemed waived.

A reasonable page limit will be imposed for all post-trial briefs, which will be determined on a case-by-case basis. Parties are required to use double-spacing (with the exception of headings, footnotes, quotations, etc.), at least 12 point font, and 1 inch margins (excluding headers for CBI and footers, such as page numbers). Parties must submit a courtesy electronic copy of their brief to the undersigned in Word or WordPerfect format. If the parties have any questions regarding the acceptable formatting requirements for post-trial briefs, they should contact the undersigned' attorney-advisor.

### **11.2 Proposed Findings of Fact; Form and Content.**

The proposed findings of fact shall be in the form of numbered paragraphs. The findings shall reflect all section 337 elements, all issues outlined in the notice of investigation, and any other issues that arose during the course of the investigation. Section headings consistent with the outline of the post-hearing brief may be used to set off paragraphs that relate to particular section 337 elements or issues. To be accepted without alteration, a proposed finding of fact must be an assertion of fact only (*i.e.*, without argument more appropriately placed in the post-hearing brief). Each proposed finding of fact **must** be followed with citations to supporting authority in the evidence. Examples of commonly used citations are as follows:

Transcript: Smith, Tr. 895 [Witness Name, Transcript page, Line number(s)]

Exhibits: CX 3; RX 5; SPX 2

Pleadings: Complaint ¶ 4, at 2; XYZ Corp. Response to Complaint ¶ 5, at 3.

### **11.3 Post-trial Reply Briefs; Filing and Content.**

On or before the date set forth in the procedural schedule, the parties shall file a post-trial reply brief together with objections and rebuttals to the proposed findings of fact of each other party. The post-trial reply brief shall discuss the issues and evidence discussed in the initial post-trial briefs of each opposing party, following the general outline of the briefs as set forth in **Appendix B**.

A reasonable page limit will be imposed on all post-trial reply briefs, which will be determined on a case-by-case basis. The formatting requirements detailed in Ground Rule 11.1 shall also govern.

### **11.4 Objections and Rebuttals to Proposed Findings of Fact; Form and Content.**

A party's objections and rebuttals to proposed findings of fact of an opposing party shall repeat the text and citation to the record of the proposed finding of fact being objected to or rebutted and its paragraph number. Rebuttals shall assert only facts (*i.e.*, without argument more appropriately placed in the post-hearing reply brief), and **must** be followed with citations to the party's own proposed findings of fact or to other supporting authority in the evidence. Proposed findings of fact not objected to or specifically rebutted shall be deemed to have been admitted.

## **12. Citation of Cases**

The official case reporter citation must be included for any published decision or order that is cited in a party's briefs or pleadings. Additionally, the docket number and the full date of the disposition must be included in the citation of any unreported decision or order that is referenced by the parties. A copy of any cited decision or order that is not available on Westlaw or LEXIS shall be provided in an appendix to the brief or pleading. Further, every party must cite to the specific page(s) of the cited decision or order that includes the holding for which the authority is cited.

## **13. Cooperation Among Parties**

Due to the time limitations imposed by section 337, counsel shall attempt to resolve, by stipulation or negotiated agreement, any procedural problems encountered, including those relating to discovery and submission of evidence. To assure the proper cooperative spirit in this investigation, continuing good faith communications between counsel for the parties is essential and is expected.

## **14. Ex Parte Contacts**

There shall be no *ex parte* contacts with the Administrative Law Judge. Any questions of a technical or procedural nature shall be directed to the Administrative Law Judge's attorney-advisor, Jennifer Whang, at (202) 205-2681 or Jennifer.Whang@usitc.gov.

## **APPENDIX A**

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

In the Matter of

**Certain . . .**

Investigation No. 337-TA-\_\_\_\_

**SUBPOENA DUCES TECUM**

**TO: NAME  
ADDRESS**

**TAKE NOTICE:** By authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), 5 U.S.C. § 556(c)(2), and pursuant to 19 C.F.R. § 210.32 of the Rules of Practice and Procedure of the United States International Trade Commission, and upon an application for subpoena made by ["Complainant(s)" / "Respondent(s)"/ etc., followed by name of company]\_\_\_\_

\_\_\_\_\_,  
**YOU ARE HEREBY ORDERED** to produce at \_\_\_\_\_, on \_\_\_\_\_, or at such other time and place agreed upon, all of the documents and things in your possession, custody or control which are listed and described in Attachment A hereto. Such production will be for the purpose of inspection and copying, as desired.

If production of any document listed and described in Attachment A hereto is withheld on the basis of a claim of privilege, each withheld document shall be separately identified in a privileged document list. The privileged document list must identify each document separately, specifying for each document at least: (1) the date; (2) author(s)/sender(s); (3) recipient(s), including copy recipients; and (4) general subject matter of the document. The sender(s) and recipient(s) shall be identified by position and entity (corporation or firm, etc.) with which they are employed or

associated. If the sender or the recipient is an attorney or a foreign patent agent, he or she shall be so identified. The type of privilege claimed must also be stated, together with a certification that all elements of the claimed privilege have been met and have not been waived with respect to each document.

If any of the documents or things listed and described in Attachment A hereto are considered "confidential business information," as that term is defined in the Protective Order attached hereto, such documents or things shall be produced subject to the terms and provisions of the Protective Order.

Any motion to limit or quash this subpoena shall be filed within **ten (10) days** after the receipt hereof. At the time of filing of any motion concerning this subpoena, two courtesy copies shall be served concurrently on the Administrative Law Judge at his office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this \_\_\_ day of \_\_\_\_\_, 200\_.

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Charles E. Bullock  
Administrative Law Judge  
United States International Trade Commission

**UNITED STATES INTERNATIONAL TRADE COMMISSION**

**Washington, D.C.**

In the Matter of

Certain . . .

Investigation No. 337-TA-\_\_\_\_

**SUBPOENA AD TESTIFICANDUM**

**TO:** NAME  
ADDRESS

**TAKE NOTICE:** By authority of section 337 of the Tariff Act of 1930, as amended (19 U.S.C. § 1337), 5 U.S.C. § 556(c)(2), and pursuant to 19 C.F.R. § 210.32 of the Rules of Practice and Procedure of the United States International Trade Commission, and upon an application for subpoena made by ["Complainant(s)" / "Respondent(s)" / etc., followed by name of company]\_\_\_\_

**YOU ARE HEREBY ORDERED** to present yourself for purposes of your deposition upon oral examination on \_\_\_\_\_, at \_\_\_\_\_, or at such other time and place agreed on, concerning the subject matter set forth in Attachment A hereto.

This deposition will be taken before a Notary Public or other person authorized to administer oaths and will continue from day to day until completed.

If any of your testimony is considered "confidential business information," as that term is defined in the Protective Order attached hereto, such testimony shall be so designated and treated according to the terms and provisions of the Protective Order.

Any motion to limit or quash this subpoena shall be filed within **ten (10) days** after the

receipt hereof. At the time of filing of any motion concerning this subpoena, two courtesy copies shall be served concurrently on the Administrative Law Judge at his office.

IN WITNESS WHEREOF the undersigned of the United States International Trade Commission has hereunto set his hand and caused the seal of said United States International Trade Commission to be affixed at Washington, D.C. on this \_\_\_\_ day of \_\_\_\_\_, 200\_.

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Charles E. Bullock  
Administrative Law Judge  
United States International Trade Commission

**APPENDIX B**

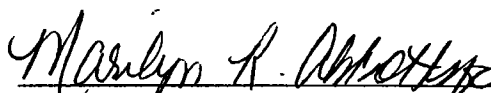
## GENERAL OUTLINE FOR ALL BRIEFS

- I. INTRODUCTION
  - A. Procedural History
  - B. The Parties
  - C. Overview of the Technology
  - D. The Patents at Issue
  - E. The Products at Issue
  
- II. JURISDICTION
  
- III. PATENT "A"
  - A. Claim Construction
    - 1. First Disputed Claim Term (Claims 1, 2, 3, . . .)
    - 2. Second Disputed Claim Term (Claims 1, 2, 3, . . .)
  - B. Infringement
    - 1. Claim 1
    - 2. Claim 2
  - C. Domestic Industry - "Technical Prong"
  - D. Validity
    - 1. Anticipation Under 35 U.S.C. § 102(a)
    - 2. Obviousness Under 35 U.S.C. § 103(a)
  - E. Unenforceability
  - F. Other Defenses
  
- IV. PATENT "B" ...
  
- V. DOMESTIC INDUSTRY - ECONOMIC PRONG
  - A. Significant Investment in Plant and Equipment
  - B. Significant Employment of Labor or Capital
  
- VI. REMEDY AND BONDING

**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. 2** has been served upon, **Jeffrey T. Hsu, Esq.**, Commission Investigative Attorney, and the following parties via first class mail and air mail where necessary on June 23, 2009.

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

**FOR COMPLAINANT UNEMED CORPORATION:**

Violeta Balan, Esq.  
**MAYER BROWN LLP**  
1909 K Street, N.W.  
Washington, DC 20006

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

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: \_\_\_\_\_

**RESPONDENTS:**

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

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

**ENGINEERED SPORTS  
TECHNOLOGY, INC.**  
4250 Alafaya Trail  
Oviedo, FL 32765

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: \_\_\_\_\_

**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 - 13<sup>th</sup> Street NW  
Suite 200  
Washington, DC 20005

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