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11 Attorneys for Plaintiffs  
12 and the proposed class

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CLERK U.S. DISTRICT COURT  
CENTRAL DIST. OF CALIF.  
SAN JUAN ANA

FILED

13 UNITED STATES DISTRICT COURT  
14 CENTRAL DISTRICT OF CALIFORNIA

15 MICHAEL RIVERA and DAN ABELL,  
16 individually and on Behalf of All Others  
17 Similarly Situated,

18 Plaintiff,

19 vs.

20 BIO-ENGINEERED SUPPLEMENTS &  
21 NUTRITION, INC., d/b/a BSN, INC., a  
22 Florida Corporation, CHRISTOPHER  
23 FERGUSON, an individual, and DOES 1  
24 through ~~250~~, inclusive;

25 10

26 Defendants.

Case No. SACV07-1306 JVS (RNBx)

CLASS ACTION COMPLAINT

JURY TRIAL DEMANDED

Complaint Filed:

Trial Date:

None Set

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28 ///

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1 Plaintiffs Michael Rivera and Dan Abell (“Plaintiffs”), individually and on behalf  
2 of the Class described below, by their attorneys, make the following allegations based  
3 upon information and belief, except as to allegations specifically pertaining to Plaintiffs  
4 and their counsel, which are based on personal knowledge. Plaintiffs bring this action  
5 for damages and injunctive relief against Defendants Bio-Engineered Supplements &  
6 Nutrition, Inc. (“BSN”) and Chris Ferguson, demanding a trial by jury.

### 8 NATURE OF THE ACTION

9 1. Plaintiffs bring this class action against Defendants to recover damages and  
10 other relief available at law and in equity on behalf of themselves and members of the  
11 following class:

12 *All persons located within the United States who purchased*  
13 *any BSN product purportedly containing “Creatine Ethyl*  
14 *Ester Malate” or “CEM3” from November 6, 2003 to the*  
15 *present, including BSN’s “Cellmass, “Nitrix,” and “N.O.-*  
16 *Xplode” products.*

17 2. BSN is one of the leading sellers of various nutritional supplements and  
18 claims to be one of the fastest growing private companies in the United States.<sup>1</sup> BSN  
19 develops, manufactures, and sells nutritional supplements sold to customers who ingest  
20 these products for various reasons, including to try to lose weight, gain muscle, increase  
21 strength, or improve physical fitness in other ways.

22  
23 3. One of BSN’s leading products is called “Cellmass.” BSN claims – on its  
24 product containers, website, and various advertisements – that Cellmass contains a

25  
26 <sup>1</sup> On its website, BSN claims, among other things, it: (1) has grown at a rate of 3,027.3 % over the last three years; (2) is  
27 “ranked No. 27 as one of the “fastest growing privately held compan[ies] in America by Inc. 500”; (3) is “ranked No. 2 as  
28 the fastest growing privately held company in the Miami-Ft. Lauderdale metro region by Inc. 500”; and (4) “is to be  
featured in Forbes Magazine in the Dec 2007 issue as one of the fastest growing privately held companies in America.”  
(See [www.bsonline.net/programs/articles](http://www.bsonline.net/programs/articles)). True and correct copies of relevant excerpts from BSN’s website are attached  
as Exhibit A.

1 substance it calls "Creatine Ethyl Ester Malate," otherwise referred to as "CEM3<sup>tm</sup>."  
2 BSN claims CEM3 is a new form of Creatine it created, that it possesses a patent  
3 pending for this substance, and that CEM3 is far superior to earlier forms of creatine  
4 (such as Creatine Monohydrate and Creatine Ethyl Ester). On its website, BSN claims  
5 that CEM3 is "the most technologically advanced form of creatine available, and found  
6 only in Cellmass from BSN." BSN claims the primary reason Cellmass is superior to  
7 competing products is because of the supposed advantages of CEM3 over other, earlier  
8 forms of Creatine, including that it supposedly: (a) is "acid resistant" and causes less  
9 water retention, cramps, and diarrhea, and (b) offers "unique lipid – and water –  
10 'friendly properties which allow it to quickly enter your bloodstream'" and therefore  
11 "requires no loading (i.e. high doses of creatine taken for several days)." (See relevant  
12 excerpts from BSN's website attached as Exhibit A).

13  
14 4. However, the truth is that Cellmass does **not contain any** Creatine Ethyl  
15 Ester Malate, despite BSN's claim that CEM3 comprises 18% of each Cellmass bottle.  
16 Therefore, BSN's claim that Cellmass contains CEM3 is false, as are its associated  
17 claims of superior performance stemming from this non-existent substance. BSN's  
18 claim to a patent-pending for CEM3 is also false. In reality, BSN has no patent or  
19 patent pending for this non-existent substance. Yet, BSN continues to make these  
20 clearly false claims in its advertisements, on its website, and on product labels even  
21 though it knows such statements are false.

22  
23 5. BSN promotes and sells tens of thousands of Cellmass products at more  
24 than \$40 per bottle based on the fundamental claim that each bottle contains a  
25 significant amount of a substance – a supposedly new and superior form of creatine that  
26 BSN claims to have created – that is in fact completely absent from the Cellmass sold to  
27 thousands of customers. Accordingly, BSN's many claims regarding the purported  
28 superiority of the Cellmass product due to the alleged properties of CEM3 are also

1 patently false given the complete absence of such a substance in its product. As a  
2 result, thousands of consumers have purchased the Cellmass product lacking the  
3 primary ingredient BSN claims will offer them superior physical fitness and  
4 performance.

5  
6 6. Plaintiffs are also informed and believe and thereon allege that BSN falsely  
7 claims that other products besides Cellmass contain CEM3, including its "Nitrix," and  
8 "N.O.-Xplode" products, when in fact this supposed substance is also completely absent  
9 from such products. Accordingly, BSN's many claims regarding the purported  
10 superiority of its Nitrix and N.O.-Xplode products due to the alleged properties of  
11 CEM3 are also patently false given the complete absence of such a substance in its  
12 product. As a result, thousands of consumers have purchased these products lacking the  
13 primary ingredient BSN promises will offer them superior physical fitness and  
14 performance.

15  
16 **THE PARTIES**

17 7. Plaintiff Michael Rivera is a resident of Orange County, California and has  
18 previously purchased and used Cellmass from BSN or its distributors.

19  
20 8. Plaintiff Dan Abell is a resident of Orange County, California and has  
21 previously purchased and used Cellmass from BSN or its distributors.

22  
23 9. Plaintiffs are informed and believe that defendant Bio-Engineered  
24 Supplements & Nutrition, Inc. dba BSN, Inc. ("BSN") is a Florida corporation doing  
25 business in the State of California. BSN's principal place of business and corporate  
26 headquarters is located at 5901 Broken Sound Parkway, Boca Raton, Florida, 33487-  
27 2773.

28 ///



1 and costs, and some members of the Class are residents of, or entities formed under,  
2 states other than California. (See 28 U.S.C. Section 1332(d)(2)(A).)

3  
4 14. This Court has personal jurisdiction over each defendant, and venue is  
5 proper in this district, pursuant to 28 U.S.C. Section 1391, subsections (a) and (c),  
6 because, among other things, Defendants have purposefully availed themselves of the  
7 privilege of conducting business activities in California, where they sell the products at  
8 issue in this lawsuit to Plaintiffs and other members of the proposed class. Venue is  
9 also proper in this district, as the transactions at issue arose in this district and many  
10 class members are residents of this district.

11  
12 **FACTUAL ALLEGATIONS**

13 15. Although the claims of various supplement makers vary, in general these  
14 products are touted as promoting users' physical fitness in various ways, such as  
15 purportedly causing users to lose weight, gain muscle, increase strength, or improve  
16 stamina. Supplements are used by athletes of all types, including bodybuilders,  
17 recreational weightlifters, and others interested in improving their athletic performance,  
18 or physical appearance.

19  
20 16. BSN is one of the leading sellers and distributors of nutritional  
21 supplements and one of the fastest growing, as indicated by the various claims on its  
22 website. For example, BSN claims it: (1) has grown at a rate of 3,027.3 % over the last  
23 three years; (2) is "ranked No. 27 as one of the "fastest growing privately held  
24 compan[ies] in America by Inc. 500"; (3) is "ranked No. 2 as the fastest growing  
25 privately held company in the Miami-Ft. Lauderdale metro region by Inc. 500"; and (4)  
26 "is to be featured in Forbes Magazine in the Dec 2007 issue as one of the fastest  
27 growing privately held companies in America." (See [www.bsnonline.net/programs/  
28 articles](http://www.bsnonline.net/programs/articles)). A key reason for BSN's meteoric growth is its claim that its products are

1 technologically superior to those of competitors and will lead to better results or  
2 performance.

3  
4 17. BSN currently sells nutritional supplements of various titles, including  
5 "Cellmass," "Nitrix," "N.O.-Xplode," "True Mass," "Syntha-6," and others. Of these  
6 products, BSN claims that at least the **Cellmass, Nitrix, and N.O.-Xplode** products  
7 contain CEM3. However, Plaintiffs are informed and believe and therein alleges that  
8 such claims are patently false, and instead these products contain only an earlier, less  
9 advanced form of Creatine (Creatine Monohydrate) that has been used in competing  
10 products for many years and is not "state-of-the art" in any respect.

11  
12 18. Thus, in a classic "bait-and-switch," BSN promises that its products  
13 contain a new and improved form of Creatine that it supposedly invented, while in fact  
14 selling products that contain only basic Creatine. In reality, there is no CEM3 in these  
15 products and thus BSN's claims that its products are superior to competitors' products  
16 due to the existence of CEM3 are false, misleading, and fraudulent. Moreover, these  
17 false claims are made knowingly and willfully by BSN, who claims to be the creator  
18 and owner of alleged patent rights in this product.

19  
20 **CLASS ACTION ALLEGATIONS**

21 19. Description of the Class: Plaintiffs bring this nationwide class action on  
22 behalf of themselves and a Class defined as follows:

23  
24 *All persons located within the United States who purchased any BSN product*  
25 *purportedly containing "Creatine Ethyl Ester Malate" or "CEM3" from*  
26 *November 6, 2003 to the present, including BSN's "Cellmass, "Nitrix," and*  
27 *"N.O.-Xplode" products ("Class").*

1           20. Excluded from the Class are governmental entities, Defendants, any entity  
2 in which Defendants have a controlling interest, and Defendants' officers, directors,  
3 affiliates, legal representatives, employees, co-conspirators, successors, subsidiaries,  
4 and assigns. Also excluded from the Class is any judge, justice, or judicial officer  
5 presiding over this matter and the members of their immediate families and judicial  
6 staff.

7  
8           21. Plaintiffs reserve the right to modify the Class description and the Class  
9 period based on the results of discovery.

10  
11           22. Plaintiffs and the Class bring this action for equitable, injunctive, and  
12 declaratory relief pursuant to subdivisions (b)(1), (b)(2), and (b)(3) of Rule 23 of the  
13 Federal Rules of Civil Procedure.

14  
15           23. **Numerosity:** The proposed Class is so numerous that individual joinder of  
16 all its members is impracticable. Due to the nature of the trade and commerce  
17 involved, however, Plaintiffs believe that the total number of Class members is at least  
18 in the tens of thousands and members of the Class as numerous and geographically  
19 dispersed across the United States. While the exact number and identities of the Class  
20 members are unknown at this time, such information can be ascertained through  
21 appropriate investigation and discovery. The disposition of the claims of the Class  
22 members in a single class action will provide substantial benefits to all parties and to  
23 the Court.

24  
25           24. **Common Questions of Law and Fact Predominate:** There are many  
26 questions of law and fact common to the representative Plaintiff and the Class, and  
27 those questions substantially predominate over any questions that may affect individual  
28

1 Class members. Common questions of fact and law include, but are not limited to, the  
2 following:

- 3
- 4 a. Whether Defendants claim or have claimed that CEM3 is present in  
5 certain products they sell including the Cellmass, Nitrix, and N.O.-  
6 Xplode products;
- 7
- 8 b. Whether any CEM3 is present in any of these products Defendants  
9 claim contain CEM3;
- 10
- 11 c. Whether or not Plaintiffs and the members of the Class have been  
12 damaged by the wrongs complained of herein, and if so, the measure  
13 of those damages and the nature and extent of other relief that should  
14 be afforded;
- 15
- 16 d. Whether Defendants have engaged in unfair, unlawful and/or  
17 fraudulent business practices;
- 18
- 19 e. Whether Defendants have failed to disclose material facts about its  
20 products purportedly containing CEM3; and
- 21
- 22 f. Whether Defendants have breached the implied covenant of good  
23 faith and fair dealing with Plaintiffs and the Class.

24 25. **Typicality:** Plaintiffs' claims are typical of the claims of the members of  
25 the Class. Plaintiffs and all members of the Class have been similarly affected by  
26 Defendants' common course of conduct since the BSN products they bought all lacked  
27 CEM3 despite BSN's claims to the contrary.

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