

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
LUFKIN DIVISION**

IOVATE HEALTH SCIENCES, INC.,
UNIVERSITY OF FLORIDA RESEARCH
FOUNDATION, INC. and FLAMMA SpA,

Plaintiffs,

vs.

BIO-ENGINEERED SUPPLEMENTS &
NUTRITION, INC., d/b/a BSN Inc.
and MEDICAL RESEARCH INSTITUTE,

Defendants.

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CASE NO. 9:07-cv-46

JURY TRIAL DEMANDED

PLAINTIFFS’ ORIGINAL COMPLAINT FOR PATENT INFRINGEMENT

Plaintiffs IOVATE HEALTH SCIENCES, INC. (“IOVATE”), UNIVERSITY OF FLORIDA RESEARCH FOUNDATION, INC. (“UFRF”), and FLAMMA SpA (“FLAMMA”), (collectively “Plaintiffs”), hereby allege for their Complaint against BIO-ENGINEERED SUPPLEMENTS & NUTRITION, INC. d/b/a BSN Inc. (“BSN”) and MEDICAL RESEARCH INSTITUTE (“MRI”) (collectively “Defendants”), on personal knowledge as to their own activities and on information and belief as to the activities of others, as follows:

I.

THE PARTIES

1. IOVATE is a corporation organized and existing under the laws of Ontario, Canada, with its principal place of business at 5100 Spectrum Way, Mississauga, ON, Canada.
2. UFRF is a not-for-profit organization incorporated by the State of Florida. UFRF is a direct-support organization of the University of Florida, established to promote, encourage, and assist the faculty, staff, and students of the University of Florida in conducting research and

technology transfer, with its principal place of business at 223 Grinter Hall, University of Florida, Gainesville, Florida.

3. UFRF is the owner and assignee of United States Patent No. 6,100,287 (“the ‘287 patent”), entitled *Materials and Methods for Enhancing Muscle Performance and Recovery From Fatigue*, which duly and legally issued on August 8, 2000, a copy of which is attached as Exhibit A.

4. IOVATE is the exclusive licensee of the ‘287 patent, and has the right to institute litigation for infringement.

5. FLAMMA is a corporation organized and existing under the laws of Italy with its principal place of business at Via Bedeschi 22-24040 Chignolo d’Isola, Italy.

6. FLAMMA is the owner and assignee of United States Patent No. 5,973,199 (“the ‘199 patent”), entitled *Hydrosoluble Organic Salts Of Creatine*, which duly and legally issued on October 26, 1999, a copy of which is attached as Exhibit B.

7. IOVATE is the exclusive licensee of the ‘199 patent and has the right to institute litigation for infringement.

8. Upon information and belief, BSN is a corporation or other business entity organized and existing under the laws of Florida with a principal place of business at 5901 Broken Sound Parkway, 6th Floor, Boca Raton, Florida 33487.

9. Upon information and belief, MRI is a corporation organized and existing under the laws of California with its principal place of business at 444 De Haro St., Suite 209, San Francisco, California 94107.

II.

JURISDICTION AND VENUE

10. This is an action for patent infringement arising under the patent laws of the United States, Title 35 of the United States Code. Accordingly, this Court has subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338.

11. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 and 1400.

12. This Court has personal jurisdiction over Defendant BSN. Defendant BSN, directly or through intermediaries (including distributors, retailers, and others) ships, distributes, offers for sale, sells, and advertises its products in the United States, the State of Texas, and the Eastern District of Texas.

13. Defendant BSN has purposefully and voluntarily placed one or more of its infringing products into the stream of commerce with the expectation that they will be purchased in the Eastern District of Texas.

14. This Court has personal jurisdiction over Defendant MRI. Defendant MRI, directly or through intermediaries (including distributors, retailers, and others) ships, distributes, offers for sale, sells, and advertises its products in the United States, the State of Texas, and the Eastern District of Texas.

15. Defendant MRI has purposefully and voluntarily placed one or more of its infringing products into the stream of commerce with the expectation that they will be purchased in the Eastern District of Texas.

16. Defendant BSN ships, distributes, offers for sale, sells and advertises its product N.O.-XPLODE throughout the United States and in this judicial district.

17. Defendant BSN ships, distributes, offers for sale, sells and advertises its product NITRIX throughout the United States and in this judicial district .

18. Defendant BSN ships, distributes, offers for sale, sells and advertises its product ENDORUSH throughout the United States and in this judicial district.

19. Defendant BSN ships, distributes, offers for sale, sells and advertises its product CELLMASS throughout the United States and in this judicial district.

20. Defendant MRI ships, distributes, offers for sale, sells and advertises its product N30 throughout the United States and in this judicial district.

21. Defendant MRI ships, distributes, offers for sale, sells and advertises its product NO2 throughout the United States and in this judicial district.

22. Defendant MRI ships, distributes, offers for sale, sells and advertises its product NO2 PLATINUM throughout the United States and in this judicial district.

23. Defendant MRI ships, distributes, offers for sale, sells and advertises its product NO2 BLACK throughout the United States and in this judicial district.

24. Defendant MRI ships, distributes, offers for sale, sells and advertises its product MAXIMUM IMPACT STACK throughout the United States and in this judicial district.

25. Defendant MRI ships, distributes, offers for sale, sells and advertises its product ANABOLIC SWITCH throughout the United States and in this judicial district.

26. The label for Defendant BSN's N.O.-XPLODE product states that it contains, *inter alia*, "N.O. Meta-Fusion," which contains in addition to other ingredients, L-arginine alpha keto-glutarate.

27. The N.O.-EXPLODE label also states that it contains “Muscle Volumizing Creatine Matrix,” which includes, *inter alia*, di-creatine malate. Upon information and belief, the N.O.-EXPLODE product contains creatine malate.

28. Advertisements for the N.O.-XPLODE product state that it is “designed to support and enhance: Training Energy, Motivation and Intensity, Mental Alertness and Focus, Muscle Fullness, Vascularity and Pumps, Strength, Power, Endurance and Work Capacity, Resistance to Muscle Fatigue, Blood Flow and Delivery of Oxygen and Nutrients to Muscle Tissue, Healthy Nitric Oxide (N.O.) levels.”

29. The label for Defendant BSN’s NITRIX product states that it contains, *inter alia*, L-Arginine Alpha Keto-Glutarate.

30. Advertisements for the NITRIX product state that it is “designed to support and enhance: Muscle Fullness, Vascularity and Whole-Body Pumps, sustained Increases in Nitric Oxide (N.O.) Production, Muscle Strength, Power, Endurance and Overall Work Capacity, Blood Flow to Muscle Tissue, Removal of Fatigue-Associated Waste Products from Muscle, Calorie Partitioning (“pushing” calories into lean muscle and away from fat stores).”

31. The label for Defendant BSN’s ENDORUSH product states that it contains, *inter alia*, “NOX (Endurance & Performance) Fusion,” which contains amongst other ingredients, L-Arginine AKG.

32. Advertisements for the ENDORUSH product state that it is “an ultra-premium energy and performance supplement, designed to support: Energy, Performance, Endurance, Mental Focus, Electrolyte Replenishment/Hydration.”

33. The label for Defendant BSN’s CELLMASS product states that it contains, *inter alia*, CEM3™ (Creatine Ethyl Ester Malate).

34. Upon information and belief, the CELLMASS product contains creatine malate.

35. The label for Defendant MRI's N30 product states that it contains, *inter alia*, Arginine alpha-ketoglutarate (AAKG).

36. Advertisements for N30 state that it "combines 8 scientifically scrutinized ingredients that get absorbed rapidly to give you the perfect anti-fatigue solution right before your workout," and "[t]o achieve 'maximum force,' you need to eliminate fatigue factors and create an environment in your body that is optimized for strength, muscle recovery, fiber growth, and mental intensity."

37. The label for Defendant MRI's NO2 product states that it contains, *inter alia*, "Arginine-AKG, and only, Arginine AKG."

38. Advertisements for the NO2 product state that "Through mediation of the "signaling-molecule" nitric oxide (NO), NO2 induces powerful hemodilation and creates dramatic increases in muscle size, strength, endurance, power output, and load capacity. With its advanced sustained-release technology "pHyser3", NO2 generates a virtual permanent muscle pump, now known as the "perpetual pump."

39. The label for Defendant MRI's NO2 PLATINUM product states that it contains, *inter alia*, "Arginine alpha-Ketoglutarate (A-AKG)."

40. Advertisements for NO2 PLATINUM state that from its use "You'll experience even greater increases in lean muscle, strength, power, and muscular endurance."

41. The label for Defendant MRI's NO2 BLACK product states that it contains, *inter alia*, "Arginine alpha-Ketoglutarate (A-AKG)."

42. The advertisement for Defendant MRI's MAXIMUM IMPACT STACK states that it combines MRI's NO2 PLATINUM and CE2 products.

43. The NO2 PLATINUM product contains, *inter alia*, “Arginine-AKG, and only, Arginine AKG.”

44. Advertisements for NO2 PLATINUM state that from its use “You'll experience even greater increases in lean muscle, strength, power, and muscular endurance.”

45. The label for Defendant MRI's ANABOLIC SWITCH product states that it contains, *inter alia*, “Arginine alpha-ketoglutarate” and “Di-Creatine malate.”

46. These infringing products have been and continue to be sold in the Eastern District of Texas.

47. Each Defendant has committed the tort of patent infringement within the State of Texas, and more particularly, within the Eastern District of Texas.

III.

FIRST CAUSE OF ACTION

Infringement of U.S. Patent 5,973,199

48. Plaintiffs repeat and re-allege the allegations of paragraphs 1 through 47 of the Complaint as if fully set forth herein.

49. Defendants BSN and MRI have for a long time past been and still are infringing the '199 patent by making, using, selling, and offering for sale nutritional supplements embodying the patented invention, and will continue to do so unless enjoined by this Court.

50. Defendants' activities have been without express or implied license by Plaintiffs.

51. On information and belief, the infringement by Defendants BSN and MRI has been and continues to be willful.

52. As a result of Defendants' acts of infringement, Plaintiffs have suffered and will continue to suffer damages in an amount to be proved at trial.

53. As a result of Defendants' acts of infringement, Plaintiffs have been and will continue to be irreparably harmed by Defendants' infringement and inducement, which will continue unless Defendants are enjoined by this Court.

54. Plaintiffs believe that each Defendant's past infringement and/or continuing infringement has been deliberate and willful, and that this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

IV.

SECOND CAUSE OF ACTION

Infringement of U.S. Patent 6,100,287

55. Plaintiffs repeat and re-allege the allegations of paragraphs 1 through 54 of the Complaint as if fully set forth herein.

56. Defendants BSN and MRI have for a long time past been and still are infringing the '287 patent by making, using, selling, and offering for sale nutritional supplements embodying the patented invention, and will continue to do so unless enjoined by this Court.

57. Defendants' activities have been without express or implied license by Plaintiffs.

58. On information and belief, the infringement by Defendants BSN and MRI has been and continues to be willful.

59. As a result of Defendants' acts of infringement, Plaintiffs have suffered and will continue to suffer damages in an amount to be proved at trial.

60. As a result of Defendants' acts of infringement, Plaintiffs have been and will continue to be irreparably harmed by Defendants' infringement and inducement, which will continue unless Defendants are enjoined by this Court.

61. Plaintiffs believe that each Defendant's past infringement and/or continuing infringement has been deliberate and willful, and that this case is therefore an exceptional case, which warrants an award of treble damages and attorneys' fees in accordance with 35 U.S.C. § 285.

V.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for entry of judgment against each Defendant as follows:

A. That each Defendant has infringed the '199 Patent and the '287 Patent under 35 U.S.C. §§ 271 *et seq.*;

B. That injunctions, preliminary and permanent, be issued by this Court restraining each Defendant, their respective officers, agents, servants, directors, and employees, and all persons in active concert or participation with each, from directly or indirectly infringing, or inducing or contributing to the infringement by others of the '199 Patent and the '287 Patent.

C. That each Defendant be required to provide to Plaintiffs an accounting of all gains, profits, and advantages derived by each Defendant's infringement of the '199 Patent and the '287 Patent, and that Plaintiffs be awarded damages adequate to compensate Plaintiffs for the wrongful infringing acts by each Defendant, in accordance with 35 U.S.C. § 284;

D. That the damages awarded to Plaintiffs with regard to the '199 Patent and the '287 Patent be increased up to three times, in view of Defendants' willful infringement, in accordance with 35 U.S.C. § 284;

E. That this case be declared to be exceptional in favor of Plaintiffs under 35 U.S.C. § 285, and that Plaintiffs be awarded their reasonable attorneys' fees and other expenses incurred in connection with this action;

F. That Plaintiffs be awarded their interest and costs of suit incurred in this action;
and

G. That Plaintiffs be awarded such other and further relief as this Court may deem
just and proper.

DEMAND FOR JURY TRIAL

Pursuant to Federal Rule of Civil Procedure 38(b), Plaintiffs hereby demand a jury trial
for all issues in this case that properly are subject to a jury trial.

Respectfully submitted,

Dated: March 5, 2007

By: /s/ Melvin R. Wilcox, III
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