

1 RICHARD P. SYBERT (SBN: 080731)
rsybert@gordonrees.com
2 HAZEL MAE B. PANGAN (SBN: 272657)
hpangan@gordonrees.com
3 PATRICK J. MULKERN (SBN: 307272)
pmulkern@gordonrees.com
4 GORDON & REES LLP
101 W. Broadway, Suite 2000
5 San Diego, CA 92101
Telephone: (619) 696-6700
6 Facsimile: (619) 696-7124

7 Attorneys for Defendants OBESITY RESEARCH INSTITUTE, LLC; CONTINUITY
8 PRODUCTS, LLC; HENNY DEN UIJL; AND SANDRA DEN UIJL

9 SUPERIOR COURT OF CALIFORNIA
10 COUNTY OF SAN DIEGO

11
12 DEMARIE FERNANDEZ, ALFONSO
13 MENDOZA, BRIAN HOROWITZ, and
14 FRED DURAN, on behalf of themselves and
all those similarly situated;

15 Plaintiffs,

16 vs.

17 OBESITY RESEARCH INSTITUTE, LLC;
18 CONTINUITY PRODUCTS, LLC; HENNY
19 DEN UIJL; SANDRA DEN UIJL; BRYAN
CORLETT; WEST COAST
LABORATORIES, INC.; and DOES 13
through 100, inclusive,

20 Defendants.

CASE NO. 37-2013-00048664-CU-BT-CTL

**DEFENDANTS OBESITY RESEARCH
INSTITUTE, LLC; CONTINUITY
PRODUCTS, LLC; HENNY DEN UIJL;
AND SANDRA DEN UIJL'S ANSWER
AND AFFIRMATIVE DEFENSES TO
SECOND AMENDED COMPLAINT**

[IMAGED FILE]

Judge: Hon. John S. Meyer
Dept.: C-61

Complaint Filed: May 14, 2013
Trial Date: Not set

21
22 Defendants Obesity Research Institute, LLC; Continuity Products, LLC; Henny Den Uijl;
23 and Sandra Den Uijl (collectively, "Defendants") hereby answer the unverified Second Amended
24 Complaint ("Complaint") of Plaintiffs DeMarie Fernandez, Alfonso Mendoza, Brian Horowitz,
25 and Fred Duran ("Plaintiffs") as follows:

26 **GENERAL DENIAL**

27 Pursuant to Code of Civil Procedure section 431.30, Defendants deny each and every
28 allegation of the Complaint and each cause of action contained therein. Defendants further deny

1 that Plaintiffs have sustained or will sustain injuries or damages in the nature or sums alleged in
2 the Complaint, or to be alleged, or otherwise. Defendants further deny that Plaintiffs have
3 sustained or will sustain injuries or damages in the nature or sums alleged, by reason of any act,
4 omission or fault on the part of Defendants, and Defendants further deny engaging in any
5 wrongful conduct whatsoever.

6 **AFFIRMATIVE DEFENSES**

7 By way of further answer to the Complaint, Defendants allege on information and belief
8 the following affirmative defenses:

9 **FIRST AFFIRMATIVE DEFENSE**

10 **(Lack of Standing)**

11 Plaintiffs and/or the members of the purported class lack standing to pursue Plaintiffs'
12 purported claims, and/or to seek relief sought by the Complaint, because: (1) Plaintiffs and/or the
13 members of the purported class did not purchase the product at issue; (2) Plaintiffs and/or the
14 members of the purported class did not reasonably rely on the labels of, or challenged statements
15 related to, the product at issue; (3) the challenged statements were not relied upon, and were not
16 and are not material to Plaintiffs and/or the members of the purported class and insofar as
17 Plaintiffs and/or the members of the purported class bought the product for purposes other than
18 for consumption and/or for a purpose other than Plaintiffs' stated purpose; (4) Plaintiffs and/or
19 the members of the purported class cannot demonstrate any likelihood of future harm; and/or (5)
20 Plaintiffs and/or the members of the purported class cannot demonstrate any cognizable injury,
21 including but not limited to the foregoing reasons.

22 **SECOND AFFIRMATIVE DEFENSE**

23 **(Failure to Mitigate)**

24 Plaintiffs and/or the members of the purported class failed to mitigate any harm alleged in
25 the Complaint, including by failing to read the labels or otherwise act reasonably, failing to
26 attempt any return of the product, and/or continuing to purchase the product after learning
27 additional information about the product.

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1 **THIRD AFFIRMATIVE DEFENSE**

2 **(Lack of Causation)**

3 Any purported reliance and/or injury alleged in the Complaint was a result of, in whole or
4 in part, the conduct of non-parties. No conduct by Defendants was a substantial factor in causing
5 any harm to Plaintiffs and/or the purported class members.

6 **FOURTH AFFIRMATIVE DEFENSE**

7 **(Apportionment of Fault)**

8 Any purported reliance and/or injury alleged in the Complaint was a result of, in whole or
9 in part, the conduct of Plaintiffs and/or the purported class members and/or third party tortfeasors
10 and such conduct was a substantial factor in the harm alleged, if any such harm exists, which
11 Defendants deny. As such, Defendants are only responsible for the percentage of fault, if any
12 fault exists, actually attributable to them.

13 **FIFTH AFFIRMATIVE DEFENSE**

14 **(Waiver)**

15 Plaintiffs and/or the purported class members waived any right to complain about the
16 product when they purchased the product with full knowledge of its contents and/or the potential
17 effects thereof.

18 **SIXTH AFFIRMATIVE DEFENSE**

19 **(Accord and Satisfaction)**

20 The Complaint, and each claim alleged therein, is barred, in whole or in part, by the
21 doctrine of accord and satisfaction to the extent that Plaintiffs and/or the purported class members
22 sought and received any refund for the purchase price of the product(s) purchased.

23 **SEVENTH AFFIRMATIVE DEFENSE**

24 **(Claims Contrary to California Law/Failure to Comply With California Law)**

25 Some of Plaintiffs' and/or the purported class members' claims and/or the relief requested
26 in the Complaint are barred because such claims and relief are contrary to California law and/or
27 Plaintiffs and/or the purported class members failed to comply with such California law. Such
28 California law includes California Business and Professions Code §§ 17200 and 17500, *et seq.*,

1 California Civil Code §1750, *et seq.*, and California Commercial Code § 2607, *et seq.*

2 **EIGHTH AFFIRMATIVE DEFENSE**

3 **(Primary Jurisdiction Doctrine)**

4 Plaintiffs' and/or the purported class members' claims should be dismissed or this action
5 should be stayed in entirety under the doctrine of primary jurisdiction.

6 **NINTH AFFIRMATIVE DEFENSE**

7 **(Preemption)**

8 Some or all of Plaintiffs' and/or the purported class members' claims and/or the relief
9 sought in the Complaint are preempted by federal laws and regulations.

10 **TENTH AFFIRMATIVE DEFENSE**

11 **(Exclusion of Warranties)**

12 Defendants are not responsible for any harm to Plaintiffs and/or members of the purported
13 class because Defendants, by their words and/or conduct, limited their representations, if any,
14 about the product. Plaintiffs and/or the purported class members had an opportunity to inspect
15 the product as fully desired and failed to do so when such examination would have revealed the
16 characteristics of the product about which they now complain.

17 **ELEVENTH AFFIRMATIVE DEFENSE**

18 **(Not a Basis of the Bargain)**

19 Even if Plaintiffs and/or the purported class members suffered harm, which Defendants
20 deny, the challenged statements could not and did not constitute the basis of the bargain and, as
21 such, neither Plaintiffs nor the purported class members are entitled to any relief.

22 **TWELFTH AFFIRMATIVE DEFENSE**

23 **(Offset)**

24 Even if Plaintiffs and/or the purported class members are entitled to any damages, which
25 Defendants deny, Defendants are entitled to offset such damages by any benefits received by
26 Plaintiffs and/or the purported class members from their use of the product or any amount they
27 received from returning or reselling the product.

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THIRTEENTH AFFIRMATIVE DEFENSE

(Failure to State a Claim)

The Complaint fails to state a claim upon which relief can be granted for Plaintiffs and/or the purported class.

FOURTEENTH AFFIRMATIVE DEFENSE

(Puffery)

Plaintiffs’ and/or the purported class members’ claims are barred because the statements at issue are non-actionable puffery.

FIFTEENTH AFFIRMATIVE DEFENSE

(Unjust Enrichment)

The claims of Plaintiffs and the purported class members are barred in that they seek excessive damages from Defendants that would result in their unjust enrichment.

SIXTEENTH AFFIRMATIVE DEFENSE

(Reasonably Available Alternate Source)

Plaintiffs’ and the purported class members’ claims and/or the relief sought in the Complaint are barred because Plaintiffs and the purported class members had reasonably available alternate sources from which to obtain the desired product that were free of the terms claimed to be unfair.

SEVENTEENTH AFFIRMATIVE DEFENSE

(Improper Class Action)

Plaintiffs’ proposed putative class is improper and Defendants deny the validity of and/or propriety of class treatment. The putative classes defined in the Complaint are not properly certifiable. Plaintiffs’ claims in the Complaint are not appropriate for class treatment. In the event the Court certifies the class over Defendants’ objection, Defendants assert each affirmative defense set forth herein against each and every class member.

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EIGHTEENTH AFFIRMATIVE DEFENSE

(Improper Class Representative)

Defendants allege that Plaintiffs, and each of them, are not proper representatives of the class that they purport to represent and, accordingly, this action is not properly brought as a class action.

NINETEENTH AFFIRMATIVE DEFENSE

(Mootness)

Defendants allege that Plaintiffs and the purported class are not entitled to injunctive relief on the ground that any such relief would be moot.

TWENTIETH AFFIRMATIVE DEFENSE

(Unclean Hands)

All claims against these answering Defendants are barred, in whole or in part, by the doctrine of unclean hands.

TWENTY-FIRST AFFIRMATIVE DEFENSE

(Statute is Unconstitutionally Vague as Applied)

The underlying statutes are unconstitutionally vague, as written and/or as purported to be applied in the instant case; fails to give Defendants adequate notice of what conduct is prohibited; and, therefore, violates the Due Process and Equal Protection clauses of the United States Constitution and/or the California Constitution.

TWENTY-SECOND AFFIRMATIVE DEFENSE

(Arbitration and/or Alternate Dispute Resolution)

Plaintiffs' and the purported class members' claims are subject to arbitration and/or alternative dispute resolution.

TWENTY-THIRD AFFIRMATIVE DEFENSE

(Safe Harbor Doctrine)

Plaintiffs' and the purported class members' claims and/or requests for relief are barred by the safe harbor doctrine insofar as Defendants fully complied with all statutes and regulations in effect during the relevant time period.

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TWENTY-FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitations)

Plaintiffs’ and/or the purported class members’ claims are barred and/or limited by the applicable statutes of limitation. The applicable statutes of limitation include those pertaining to claims under Cal. Bus. & Prof. Code Sections 17200, *et seq.*, and 17500, *et seq.*, and Cal. Civil Code Section 1750, *et seq.*, and claims for breach of express and implied warranties under the California Commercial Code, and including those statutes of limitation found in California Code of Civ. Proc. Sections 338, 339 and 343, California Commercial Code Section 2725, and Cal. Bus. & Prof. Code Section 17208.

TWENTY-FIFTH AFFIRMATIVE DEFENSE

(Laches)

Plaintiffs’ and/or the purported class members’ claims are barred due to the doctrine of laches, and/or for their failure to timely provide Defendants with notice of any purported issues concerning the product(s) within a reasonable period of time, including as set forth in the California Commercial Code.

TWENTY-SIXTH AFFIRMATIVE DEFENSE

(Good Faith Pursuit of Legitimate Business Objectives)

Plaintiffs’ and/or the purported class members are barred from recovery because Defendants’ actions were undertaken in good faith, with the absence of malicious intent, and constitute lawful, proper, and justified means to accomplish legitimate business objectives.

TWENTY-SEVENTH AFFIRMATIVE DEFENSE

(No Claim Based on Conduct Specifically Permitted by Law)

Plaintiffs’ and/or the purported class members’ claims are barred in whole or in part to the extent they challenge alleged acts, conduct, or statements that are specifically permitted by law.

TWENTY-EIGHTH AFFIRMATIVE DEFENSE

(Defendants’ Acts Were Reasonable)

Plaintiffs and/or the purported class members are barred from recovery because any and all acts or omission of Defendants, their agents or employees, were reasonable, and therefore,

1 Defendants are not liable for any of the alleged damages, injuries and/or losses to Plaintiffs, if
2 any there were.

3 **TWENTY-NINTH AFFIRMATIVE DEFENSE**

4 **(Defendants Fully Complied)**

5 At all relevant times, Defendants conducted themselves in full compliance with all
6 applicable federal, state and local laws, statutes, ordinances and regulations, which compliance
7 bars Plaintiffs from asserting the claims herein.

8 **THIRTIETH AFFIRMATIVE DEFENSE**

9 **(Benefits Realized)**

10 Plaintiffs and the members of the purported class have enjoyed the benefits of their
11 choices which are the subject of the Complaint and are thereby barred from making the claims for
12 relief set forth in the Complaint.

13 **THIRTY-FIRST AFFIRMATIVE DEFENSE**

14 **(No Violation of Legislative Intent)**

15 Plaintiffs and the members of the purported class are not entitled to the relief requested as
16 any alleged violation was technical and did not violate the legislative intent of the statute.

17 **THIRTY-SECOND AFFIRMATIVE DEFENSE**

18 **(No Actual Loss)**

19 Plaintiffs and the members of the purported class have not suffered an actual loss as a
20 result of any actions by Defendants.

21 **THIRTY-THIRD AFFIRMATIVE DEFENSE**

22 **(Due Process Violation)**

23 To the extent Plaintiffs and the purported class purport to seek relief on behalf of
24 members of the general public who have suffered no damages, the Complaint and each of its
25 claims for relief therein violate Defendants' right to due process under the California and United
26 States Constitutions.

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THIRTY-FOURTH AFFIRMATIVE DEFENSE

(No Intent or Knowledge of Alleged Violation)

Plaintiffs’ and the purported class’ claims are barred, in whole or in part, to the extent that their claims are based on an alleged act or omission by Defendants that was made unintentionally, through bona fide error, or in good faith without knowledge of any violation of law.

THIRTY-FIFTH AFFIRMATIVE DEFENSE

(Consent)

Plaintiffs and the purported class cannot obtain relief on their claims based on actions undertaken by Defendants for which Defendants had the consent of Plaintiffs and the purported class.

THIRTY-SIXTH AFFIRMATIVE DEFENSE

(Damages Speculative)

The damages alleged in the Complaint are speculative and are, therefore, barred.

THIRTY-SEVENTH AFFIRMATIVE DEFENSE

(No Damages)

Plaintiffs and the purported class have failed to plead facts showing that they have suffered any cognizable damages as a result of any conduct by Defendants and, therefore, Plaintiffs and the purported class have no cause of action against Defendants.

THIRTY-EIGHTH AFFIRMATIVE DEFENSE

(Estoppel)

The Complaint, and each purported cause of action therein, is barred, in whole or in part, by Plaintiffs’ and the purported class members’ own conduct, actions, and inactions that constitute an estoppel of the purported claims for relief sought in the Complaint.

THIRTY-NINTH AFFIRMATIVE DEFENSE

(Vague, Uncertain Complaint)

The Complaint does not describe the causes of action alleged against Defendants with sufficient particularity to permit Defendants to ascertain what other defenses may exist. Defendants, therefore, reserve their right to assert all defenses that may pertain to the Complaint

1 once the precise nature of such claims or causes of action are ascertained.

2 **FORTIETH AFFIRMATIVE DEFENSE**

3 **(Acts of Others/Intervening or Superseding Cause)**

4 Plaintiffs' and the purported class' damages, if any, were the result of one or more
5 intervening or superseding causes or caused by the acts and/or failure to act of persons and/or
6 entities other than Defendants, and were not the result of any act or omission on the part of
7 Defendants.

8 **FORTY-FIRST AFFIRMATIVE DEFENSE**

9 **(No Attorneys' Fees)**

10 The Complaint fails to state facts sufficient to allow for Plaintiffs' recovery of attorneys'
11 fees; provided however, if and to the extent a basis for a claim for attorneys' fees exists,
12 Defendants allege that they are entitled to recover from Plaintiffs all attorneys' fees incurred in
13 the defense of this action.

14 **FORTY-SECOND AFFIRMATIVE DEFENSE**

15 **(No Public Benefit)**

16 Plaintiffs are not entitled to attorneys' fees as this case was filed as a means of generating
17 attorneys' fees without creating any corresponding public benefit.

18 **FORTY-THIRD AFFIRMATIVE DEFENSE**

19 **(No Reliance)**

20 The Complaint and each and every purported class of action asserted therein are barred
21 because Plaintiffs and/or the putative class members did not suffer an injury in fact caused by
22 reliance on any allegedly false or misleading statement by Defendants.

23 **FORTY-FOURTH AFFIRMATIVE DEFENSE**

24 **(No False Advertising)**

25 The Complaint and each and every purported cause of action alleged therein pleaded in
26 reliance upon California Civil Code § 17500 are barred because the materials at issue are not
27 false or misleading.

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FORTY-FIFTH AFFIRMATIVE DEFENSE

(Lack of Scienter/Knowledge of Falsity)

The Complaint and each and every purported cause of action alleged therein pleaded in reliance upon fraud theories or California Civil Code § 17500 are barred because Defendants did not know, nor should they reasonably have known, that any of the marketing of the product was false or misleading.

FORTY-SIXTH AFFIRMATIVE DEFENSE

(Res Judicata/Collateral Estoppel)

Plaintiffs’ and the purported class’ claims are barred by the doctrine of res judicata and/or the doctrine of collateral estoppel.

FORTY-SEVENTH AFFIRMATIVE DEFENSE

(Requested Relief Not Available)

Plaintiffs and the purported class may not receive their attorneys’ fees as requested in the prayer for relief, on the ground that resolution of the matters set forth in the Complaint do not affect the public interest and significant benefit will be conferred on the general public or a large class of persons. Plaintiffs and the purported class may not obtain injunctive relief, because there is no threat of future harm. Plaintiffs and the purported class may not obtain punitive damages because Defendants did not act with the requisite intent.

FORTY-EIGHTH AFFIRMATIVE DEFENSE

(Failure to State a Claim for Alter Ego Liability)

The Complaint fails to state a claim for alter ego liability against Defendants for each and every cause of action.

FORTY-NINTH AFFIRMATIVE DEFENSE

(Inability to Meet Requirements to Maintain Class Action)

Plaintiffs cannot meet the requirements of Code of Civil Procedure Section 382, Civil Code Section 1781, and corresponding case law to maintain a class action in that the putative class does have sufficient numerosity, common issues of law and fact do not sufficiently predominate, the putative class does not have sufficient commonality of injuries and damages, the

1 named plaintiffs do not adequately represent the putative class, there is no benefit to litigants or
2 the Court in maintaining this action as a class action, and/or class action status is not superior to
3 maintaining this action as an individual action in the normal course of the judicial system.

4 **FIFTIETH AFFIRMATIVE DEFENSE**

5 **(Economic Loss Doctrine)**

6 The Complaint and each and every purported cause of action alleged therein seeking tort
7 damages for alleged disappointed contractual expectations are barred by the economic loss
8 doctrine.

9 **FIFTY-FIRST AFFIRMATIVE DEFENSE**

10 **(No Private Claim for Lack of Substantiation)**

11 The Complaint and each and every purported cause of action alleged therein are barred
12 because Plaintiffs and their attorneys cannot require Defendants to demonstrate that advertising
13 of the product(s) is substantiated.

14 **FIFTY-SECOND AFFIRMATIVE DEFENSE**

15 **(Additional Affirmative Defenses)**

16 Defendants have not knowingly or intentionally waived any applicable affirmative
17 defenses and reserve the right to assert and rely on such other applicable affirmative defenses as
18 may become available or apparent during discovery proceedings. Defendants further reserve the
19 right to amend their answer and/or affirmative defenses accordingly and/or to delete affirmative
20 defenses that they determine are not applicable during the course of subsequent discovery.

21 **PRAYER FOR RELIEF**

22 WHEREFORE Defendants pray as follows:

- 23 1. That Plaintiffs and the members of the purported class take nothing by way of the
24 Complaint;
- 25 2. For judgment in favor of Defendants and against Plaintiffs and the purported class
26 members;
- 27 3. That Defendants be awarded the costs, disbursements, and attorneys' fees incurred
28 in this action; and

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4. For such other and further relief as the Court may deem fair and equitable.

Dated: November 9, 2017

Respectfully submitted,

GORDON & REES LLP

By:  _____

Richard P. Sybert
Hazel Mae B. Pangan
Patrick J. Mulkern
Attorneys for Defendants Obesity Research
Institute, LLC; Continuity Products, LLC;
Henny Den Uijl; and Sandra Den Uijl

PROOF OF SERVICE


I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: Gordon & Rees LLP, 101 West Broadway, Suite 2000, San Diego, CA 92101. On November 9, 2017, I served the within documents:

- **DEFENDANTS OBESITY RESEARCH INSTITUTE, LLC; CONTINUITY PRODUCTS, LLC; HENNY DEN UIJL; AND SANDRA DEN UIJL’S ANSWER AND AFFIRMATIVE DEFENSES TO SECOND AMENDED COMPLAINT**

BY E-SERVICE: based on an agreement of the parties to accept service by e-mail or electronic transmission, I caused the document(s) listed above to be sent to the person(s) at the e-mail address(es) on the service list below on the dates and at the times stated thereon. I did not receive, within a reasonable time after transmission, any electronic message or other indication that the transmission was unsuccessful

<p>Attorneys for Plaintiffs</p> <p>L. Timothy Fisher Neal Deckant Jared Hazlet BORSOR & FISHER, P.A. 1990 North California Blvd., Suite 940 Walnut Creek, CA 94596 Telephone: (925) 300-4455 ltfisher@bursor.com ndeckant@bursor.com jhazlett@bursor.com</p>	<p>Attorneys for Plaintiffs</p> <p>Craig M. Nicholas Alex Tomasevic Sarah Fan Emilia Carrillo NICHOLAS & TOMASEVIC, LLP 225 Broadway, 19th Floor San Diego, CA 92101 Telephone: (619) 325-0492 craig@nicholaslaw.org alex@nicholaslaw.org SFan@nicholaslaw.org ECarrillo@nicholaslaw.org</p>
<p>Attorneys for Plaintiffs</p> <p>Scott A. Bursor BORSOR & FISHER, P.A. 888 Seventh Avenue New York, NY 10019 Telephone: (212) 989-9113 scott@bursor.com</p>	

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on November 9, 2017, at San Diego, California.



Susan P. Kaye

Gordon & Rees LLP
101 W. Broadway Suite 2000
San Diego, CA 92101