

1 **BURSOR & FISHER, P.A.**
L. Timothy Fisher (State Bar No. 191626)
2 1990 North California Boulevard, Suite 940
Walnut Creek, CA 94596
3 Telephone: (925) 300-4455
Facsimile: (925) 407-2700
4 E-Mail: ltfisher@bursor.com

5 **BURSOR & FISHER, P.A.**
Scott A. Bursor (State Bar No. 276006)
6 888 Seventh Avenue
New York, NY 10019
7 Telephone: (212) 989-9113
Facsimile: (212) 989-9163
8 E-Mail: scott@bursor.com

9 **NICHOLAS & TOMASEVIC, LLP**
Alex M. Tomasevic (State Bar No. 245598)
10 Craig M. Nicholas (State Bar No. 178444)
225 Broadway, 19th Floor
11 San Diego, California 92101
Telephone: (619) 325-0492
12 Facsimile: (619) 325-0496
E-Mail: cnicholas@nicholaslaw.org
13 atomasevic@nicholaslaw.org

14 *Attorneys for Plaintiffs*

15 SUPERIOR COURT OF THE STATE OF CALIFORNIA
16 IN AND FOR THE COUNTY OF SAN DIEGO

17 DEMARIE FERNANDEZ, ALFONSO
MENDOZA, and FRED DURAN on behalf of
18 themselves and those similarly situated,

19 Plaintiffs,

20 v.

21 OBESITY RESEARCH INSTITUTE,
LLC; CONTINUITY PRODUCTS, LLC;
HENNY DEN UIJL; SANDRA DEN
22 UIJL; WEST COAST LABORATORIES,
INC.; and DOES 13 through 100, inclusive,

23 Defendants.
24

ELECTRONICALLY FILED
Superior Court of California,
County of San Diego
01/10/2020 at 05:16:00 PM
Clerk of the Superior Court
By Carolina Miranda, Deputy Clerk

Case No. 37-2013-00048664-CU-BT-CTL

**DECLARATION OF FRED DURAN IN
SUPPORT OF PLAINTIFFS' RENEWED
MOTION FOR CLASS CERTIFICATION**

Judge: Hon. John S. Meyer

Complaint Filed: May 14, 2013
Remittitur Filed: September 16, 2016
FAC Filed February 23, 2017

1 I, Fred Duran, declare:

2
3 1. I am a citizen of California, and I live in San Diego, California. I am a Plaintiff in
4 this case. I make this declaration in support of my request that the Court certify this case as a
5 class action, appoint me as a class representative, and appoint Bursor & Fisher, P.A. and Nicholas
6 & Tomasevic, LLP as class counsel. The statements made in this Declaration are based on my
7 personal knowledge and, if called as a witness, I could and would testify to them.

8 2. During the class period, I purchased Lipozene from a Walmart retail store in San
9 Diego, California. In connection with my purchase, I saw the product labeling saying that
10 Lipozene was “Safe and Effective” and was “Clinically Proven” to “Reduce Weight” and
11 “Reduce Body Fat.” The container also contained an image of a Lipozene pill directly dissolving
12 body fat on contact and said that “78% of weight lost is pure body fat!” I understood those claims
13 to mean that Lipozene was safe and effective for weight loss and control. I would not have
14 purchased Lipozene if I knew the product was mislabeled and ineffective, as I confirmed in my
15 deposition:

16 Q. Mr. Duran, why are you suing Obesity Research Institute?

17 A. I purchased a product that didn’t work for me and felt that
18 the claims on the product were false.

19 Q. Mr. Duran, why are you suing Wal-Mart?

20 A. That’s where the product was purchased.

21 ...

22 Q. And throughout this questioning you’ve been talking about a
23 product that didn’t work that you purchased; correct?

24 A. Correct.

25 Q. And what product is that?

26 A. Lipozene.

27 Q. And you mentioned that the claims that Obesity Research
28 Institute makes regarding Lipozene you feel are false?

A. Correct.

10/15/13 Duran Dep. at 21:11-17, 22:4-13.

1 3. I assisted with my lawyers' investigation by describing the events surrounding my
2 purchase of Lipozene. Specifically, I described where I purchased Lipozene, when I purchased it,
3 why I purchased it, how I purchased it (*e.g.*, online versus retail, cash versus credit), and what
4 representations I reviewed and relied upon when making my purchase. I also provided my
5 attorneys with any relevant documentation for their review. I also testified to these things at my
6 deposition:

7 Q. When approximately did you purchase Lipozene?

8 A. It would have been around March of 2013.

9 ...

10 Q. You indicated that you believe that Lipozene is marketed to
assist in losing fat?

11 A. Correct.

12 Q. Is that what you believed Lipozene would do for you?

13 A. Yes.

14 Q. Why did you believe that?

15 A. I saw the infomercial – I didn't see the whole commercial,
16 but I remember seeing it. Then I saw the packaging at Wal-
17 Mart. Then I researched it on the internet, just at the
Lipozene website, and the thing that struck me was no
change in lifestyle was required, just the two pills before
every meal.

18 Q. When approximately did you see the infomercial regarding
Lipozene?

19 A. I remember seeing the infomercial late at night. It was
20 probably December of 2012, off and on between there.

21 ...

22 Q. Approximately when did you encounter that product
[Lipozene] at a Wal-Mart?

23 A. That probably was at the very beginning of March.

24 Q. Which Wal-Mart – what's the physical address of the Wal-
25 Mart that you visited and came across the product Lipozene
in the very beginning of March 2013?

26 A. If it was during the weekend, it would be the one that's
27 located off the 805, so I think that's called Kearny Mesa or
Claremont. I'm not sure.

28 ...

1 Q. Was there anything other the fact that the product did not
2 strike you as flashy that caught your attention on the
3 Lipozene product in early March of 2013 at the Kearny
4 Mesa Wal-Mart location?
5 A. Just that it made me recall the infomercial.
6 Q. What specifically at that time did you recall about the
7 infomercials?
8 A. I remember the infomercial, the fact that there's no change
9 in lifestyle required.
10 ...
11 Q. On the day that you ended up purchasing the product
12 Lipozene at Wal-Mart either on Kearny Mesa or Oceanside
13 in early March of 2013, do you recall where the product
14 Lipozene was located at that time?
15 A. It was in the same area, the medical aisle, medicine aisle.
16 ...
17 Q. What do you recall about Lipozene's website when you
18 visited it?
19 A. As soon as you went on the website, there was a video to
20 click on. The video was maybe three minutes long.
21 Q. Did you watch that video?
22 A. Yes.
23 Q. Do you recall any claims specifically that were made in the
24 video when you clicked on it?
25 A. The same claims that I recalled from the infomercial about
26 no change in lifestyle required.
27 ...
28 Q. And approximately how many packages of Lipozene did
you purchase at that time?
A. Two.
Q. Do you recall approximately how much that cost you to
purchase the two packages of Lipozene in early March of
2013?
A. I believe each bottle was just under \$20.
Q. Why did you purchase two packages?
A. So that I wouldn't have to go purchase again.
...
Q. And by what means did you purchase the product Lipozene?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. Cash.

...

Q. And can you – looking at ORI000230 [labeling exemplars], can you tell me what representations you believe to be false or misleading?

A. The part where it says “Helps Reduce Weight” and “Helps Reduce Body Fat.”

10/15/13 Duran Dep. at 24:1-18, 29:4-6, 32:3-14, 37:11-21, 39:2-8, 43:15-24, 47:5-7, 78:24-79:3.

4. Based on this information, my attorneys prepared a Class Action Complaint. I carefully reviewed the Complaint for accuracy and approved it before it was filed:

Q. Mr. Duran, do you have Exhibit 2 in front of you?

A. Yes.

Q. What is Exhibit 2?

A. It is the class action complaint.

Q. And Mr. Duran, what is your understanding of when this action was filed?

A. I believe it was early May. The document says May 13th, 2013.

...

Q. Is today the first time you’ve seen this complaint?

A. No, sir.

Q. When did you first see it?

A. I saw it back in, I would say, early May.

Q. Did you see it before it was filed with the court?

A. Correct.

10/15/13 Duran Dep. at 65:8-16, 97:7-17.

5. My lawyers have kept me informed about their efforts to litigate this matter. I discussed the motion for class certification with them and gave my approval prior to filing it.

6. I believe that I am qualified to serve as a class representative in this case. I hired qualified, experienced lawyers who have a successful track record in consumer class actions involving false and misleading advertising claims. Also, I have supervised and consulted periodically with my counsel to review, discuss, and determine the actions to be taken and decisions to be made in pursuit of this case on behalf of all class members:

1 Q. Mr. Duran, do you have any idea what “class certification”
2 means?
3 A. My understanding is that the claim goes forward as a class
4 action, so it’s not just me versus the defendants.
5 Q. What leads you to believe that there are other people who
6 may have had similar dissatisfaction with the product
7 Lipozene?
8 A. You’re asking for my opinion?
9 Q. Correct.
10 A. I feel if someone such as myself would not benefit from the
11 product, there’s going to be a lot more individuals that
12 would not benefit from the product.
13 Q. But you haven’t done any research on the internet to that
14 effect?
15 A. Not myself, no.
16 Q. Do you have an understanding that others have on your
17 behalf?
18 A. Yes.
19 Q. Are you referring to your attorneys?
20 A. Correct.
21 ...
22 Q. Do you believe that class counsel is adequate?
23 A. Yes.
24 Q. Why?
25 A. I’ve known Craig for a long time. I know he’s – one of his
26 areas of practice is class action[s], and I did have a prior
27 class action with him. ...

21 10/13/15 Duran Dep. at 67:12-68:8, 71:25-72:7.

22 7. I have actively participated in this litigation by providing detailed information for
23 the Complaint, which I reviewed prior to filing; by keeping up on developments in the case,
24 including the Court’s rulings on Defendants’ motions to dismiss and the parties’ various
25 discovery motions; by responding to 33 Requests for Production; by searching for and producing
26 documents in discovery; by responding to 50 Interrogatories, and later serving amended
27 responses; by sitting for a deposition about my purchase and use of Lipozene; by meeting all case
28 deadlines to date; and by working with my lawyers to advance the lawsuit by moving for class

1 certification. Based on the interactions and my relationship with my attorneys, I believe they will
2 fairly and adequately represent me and the Class.

3 8. I understand the obligations of serving as a class representative. Specifically, I
4 understand that, as a class representative, I have an obligation to assert and protect the interests of
5 other class members and not act just for my own personal benefit. I do not have any conflicts
6 with other class members, nor am I aware of any facts that may give rise to any conflicts. I will
7 do my best to continue to protect the interests of other class members and will fairly and
8 adequately represent the class to the best of my ability. I am prepared and willing to serve as a
9 fiduciary on behalf of the class. I am also prepared to try this case through trial, and through any
10 resulting appeals, on behalf of the class. In doing so, I will continue to work with class counsel
11 on behalf of active class members:

12 Q. What is it, Mr. Duran, that you want for the class?

13 A. Well, from my understanding of class actions, and as the
14 representative, it has a consumer protection [component], so
15 I want the class to be protected, and I feel the class is
16 anybody that purchased the product or potentially may
17 purchase the product.

18 ...

19 Q. Mr. Duran, what are the contemplated classes that you seek
20 to represent here in this lawsuit?

21 A. People that have purchased the product and the people that
22 may purchase the product.

23 ...

24 Q. Do you, sir, have any understanding of what the status of the
25 litigation is in this matter?

26 A. It's my understanding because of the deposition that it's
27 probably in discovery, and whether or not it's going to be
28 certified as a class.

Q. Do you have any – have you ever reviewed any discovery
responses in this action?

A. Other than the requests for production, that's all.

...

Q. Mr. Duran, what is your understanding of your duty as a
class representative?

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

A. I would say my duty is just to be available as the named plaintiff in the case, so in whatever capacity that my attorneys ask me to be, like being here, for example.

Q. Do you feel you have a fiduciary duty to the class?

A. Yes.

Q. What steps have you taken, sir, to fulfill your fiduciary duty to the class?

A. I've just been available to my attorneys every step of the way.

10/13/15 Duran Dep. at 22:23-23:5, 66:2-6, 66:11-20, 70:18-71:5.

9. It is my understanding that Defendants sold me the same products, labeled in the same way, as it did all other class members who bought Lipozene.

10. I estimate that I spent a 20 to 40 hours working with my lawyers on this case over the years.

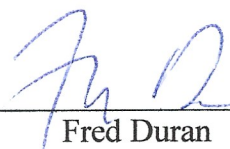
Q. Can you approximate for me the total amount of time that you have dedicated to attempting to be a class representative in this matter?

A. I'd say minimum 20 hours that I've actually been actively working on this.

10/13/15 Duran Dep. at 69:20-70:3 (objections omitted).

The above statements are of my own personal knowledge, and I make such statements under penalty of perjury under the laws of California and the United States of America.

Executed on this 9th day of January, 2019 in San Diego, California.



Fred Duran