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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF LOS ANGELES

Coordination Proceeding)	JUDICIAL COUNCIL
Special Title (Rule 1550(b)))	COORDINATION PROCEEDING
)	NO. 4032
DIET DRUG CASES)	
_____)	PHENTERMINE DEFENDANTS'
)	MASTER ANSWER TO PLAINTIFFS'
THIS DOCUMENT RELATES TO:)	MASTER COMPLAINT; DEMAND FOR
)	JURY TRIAL
ALL ACTIONS)	
_____)	

Defendant, which is alleged to have manufactured, sold, distributed, licensed and/or promoted the product phentermine, for itself and for no others, answers plaintiff's Master Complaint as follows:

- The use of a feminine pronoun in this Answer includes male, neuter and plural pronouns and any singular in this Answer, referring to "plaintiff" or "defendant", shall include the plural reference, where appropriate.
- Under the provisions of *Code of Civil Procedure* Section 431.30(d), defendant denies each and every allegation of the Master Complaint and the whole thereof, and further denies that plaintiff has been damaged in the sum alleged or any sum whatsoever. Defendant further denies that plaintiff's alleged injuries resulted from or were in any way connected with any act, omission, fault, conduct or liability on the part of defendant whether negligent, careless, intentional, unlawful, or of any nature alleged or otherwise and denies that defendant was in any

1 way negligent, careless, reckless, wanton or unlawful.

2 **FOR A FIRST, SEPARATE AND AFFIRMATIVE DEFENSE:**

3 3. Defendant is informed and believes and upon such information and belief alleges
4 that the Master Complaint fails to state facts sufficient to constitute any cause of action against it.

5 **FOR A SECOND, SEPARATE AND AFFIRMATIVE DEFENSE:**

6 4. Defendant is informed and believes and upon such information and belief alleges
7 that the alleged incident and damages complained of by plaintiff, if there actually were any, said
8 incident and damages being expressly denied by the defendant, was proximately caused by the
9 negligence and/or other fault of plaintiff and/or firms, persons, corporations or entities other than
10 the defendant, and that said negligence and/or other fault comparatively reduces the percentage of
11 any negligence and/or other fault attributable to the defendant, if it should be found that the
12 defendant was negligent or otherwise at fault, which the defendant expressly denies. Accordingly,
13 plaintiff's claims against it should be dismissed, reduced, offset, or barred in accordance with the
14 principles of contributory negligence and/or comparative negligence.

15 **FOR A THIRD, SEPARATE AND AFFIRMATIVE DEFENSE:**

16 5. Defendant is informed and believes and upon such information and belief alleges
17 that plaintiff has no standing to bring this action and/or to seek the relief requested in the Master
18 Complaint.

19 **FOR A FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

20 6. Defendant is informed and believes and upon such information and belief alleges
21 that plaintiff's claims against it are barred under the principles of assumption of the risk and/or
22 informed consent.

23 **FOR A FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

24 7. Defendant is informed and believes and upon such information and belief alleges
25 that plaintiff's claims should be dismissed and/or transferred due to improper and/or inconvenient
26 venue.

27 **FOR A SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

28 8. Defendant alleges that plaintiff's claims are subject to Restatement (Third) of Torts:

1 Product Liability §6(c).

2 **FOR A SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

3 9. Defendant is informed and believes and upon such information and belief alleges
4 that the alleged injuries in question, if any, and the alleged damages in question, if any, were the
5 result of the unforeseeable misuse and/or abuse of the product[s] in question.

6 **FOR AN EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

7 10. Defendant is informed and believes and upon such information and belief alleges
8 that pursuant to the Learned Intermediary Doctrine, defendant owed no duty to directly warn the
9 plaintiff of the risk of using the product[s], if any.

10 **FOR A NINTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

11 11. Defendant is informed and believes and upon such information and belief alleges
12 that the plaintiff failed to take proper and reasonable steps to avoid or to mitigate the damages
13 alleged, and to the extent of such failure to mitigate or to avoid damages, any recovery by the
14 plaintiff must be reduced accordingly.

15 **FOR A TENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

16 12. Defendant is informed and believes and upon such information and belief alleges
17 that if, in fact, the plaintiff was damaged in any manner whatsoever, said damages, if any, were a
18 direct and proximate result of the intervening and superseding conduct on the part of other named
19 or unnamed parties, not the defendant, and that such intervening and superseding conduct of said
20 other parties precludes recovery against the defendant.

21 **FOR AN ELEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

22 13. Defendant is informed and believes and upon such information and belief alleges
23 that if plaintiff sustained an injury, said injury being expressly denied by defendant, following the
24 receipt of any product[s] of defendant, then said injury was a result of an idiosyncratic event and
25 was due in no way to any fault of defendant.

26 **FOR A TWELFTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

27 14. Defendant is informed and believes and upon such information and belief alleges
28 that the Master Complaint, and each and every issue raised therein, is barred by each and every

1 applicable statute of limitations, including, but not limited to *Code of Civil Procedure*, sections,
2 337, 338, 339(1), 340, 340.4, 340.5, 343, 350 and *Civil Code* §1783.

3 **FOR A THIRTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

4 15. Defendant is informed and believes and upon such information and belief alleges
5 that the allegations in plaintiff's Complaint are pre-empted by the provisions of the federal Food,
6 Drug and Cosmetic Act and the Regulations promulgated pursuant to that Act.

7 **FOR A FOURTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

8 16. Defendant is informed and believes and upon such information and belief alleges
9 that parties both served and unserved, named and unnamed, and plaintiff are in some manner or
10 percentage responsible for plaintiff's injuries or non-economic damages, if any, and defendant
11 requires an order from the trier of fact setting forth separate judgments against each and every
12 party, named and unnamed, served and unserved, and plaintiff, for the amount of all non-economic
13 damages that may be recovered by the plaintiff in direct proportion to the percentage of fault of
14 each party, named and unnamed, served and unserved, and plaintiff, pursuant to *Civil Code*
15 §1431.2.

16 **FOR A FIFTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

17 17. Defendant is informed and believes and upon such information and belief alleges
18 that the Master Complaint, and each and every issue raised therein, is barred by the doctrines of
19 laches, unclean hands, waiver and/or estoppel.

20 **FOR A SIXTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

21 18. Defendant alleges that phentermine is subject to the Comment (j) exception to
22 section 402A on strict tort liability as defined in the Restatement (Second) of Torts.

23 **FOR A SEVENTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

24 19. Defendant is informed and believes and upon such information and belief alleges
25 that the plaintiff has failed to join all necessary and indispensable parties and, therefore, complete
26 relief cannot be accorded to those who are already parties to this action and plaintiff's failure to
27 join all necessary and indispensable parties will result in prejudice.

28 **FOR AN EIGHTEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

1 20. Defendant is informed and believes and upon such information and belief alleges
2 that plaintiff's causes of action for strict liability are barred by section 402A of the Restatement
3 (Second) of Torts, Comment k, as adopted by the California Supreme Court in *Brown v. Superior*
4 *Court*, 44 Cal.3d 1049 and all subsequent cases following same.

5 **FOR A NINETEENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

6 21. Defendant is informed and believes and upon such information and belief alleges
7 that plaintiff's causes of action are barred by the State of the Art Doctrine.

8 **FOR A TWENTIETH, SEPARATE AND AFFIRMATIVE DEFENSE:**

9 22. Defendant is informed and believes and upon such information and belief alleges
10 that plaintiff's injuries, if any, and damages awarded for same, if any, are limited by *Civil Code*
11 §§3333.1 and 3333.2.

12 **FOR A TWENTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE:**

13 23. Defendant is informed and believes and upon such information and belief alleges
14 that plaintiff's claims are barred under Section 4 *et. seq.* of the Restatement (Third) of Torts:
15 *Products Liability*.

16 **FOR A TWENTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE:**

17 24. Defendant is informed and believes and upon such information and belief alleges
18 that any alleged warranty was disclaimed.

19 **FOR A TWENTY-THIRD, SEPARATE AND AFFIRMATIVE DEFENSE:**

20 25. Defendant is informed and believes and upon such information and belief alleges
21 that plaintiff failed to notify defendant of any alleged breach of warranty within a reasonable time
22 after plaintiff discovered or should have discovered any such alleged breach and is, therefore,
23 barred from any recovery for such claims.

24 **FOR A TWENTY-FOURTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

25 26. Defendant is informed and believes and upon such information and belief alleges
26 that plaintiff impermissibly seeks to impose liability on conduct protected from liability by the First
27 Amendment to the United States Constitution and by Section 2 of Article I of the Constitution of
28 the State of California.

1 **FOR A TWENTY-FIFTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

2 27. Defendant is informed and believes and upon such information and belief alleges
3 that plaintiff lacks standing to prosecute a claim for injunctive and/or monetary relief pursuant to
4 *Business & Professions Code* §§17200, 17203 and 17205.

5 **FOR A TWENTY-SIXTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

6 28. The Master Complaint fails to state facts sufficient to state a claim for injunctive
7 relief pursuant to *Business & Professions Code* §§17200, 17203 and 17205.

8 **FOR A TWENTY-SEVENTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

9 29. Defendant is informed and believes and upon such information and belief alleges
10 that plaintiff does not allege that it manufactured, sold, distributed and/or promoted a product that
11 caused plaintiff's injuries and damages, and judgment against it therefore is barred by the
12 Fourteenth Amendment of the U.S. Constitution, and by Article 1, Section 7 of the Constitution of
13 the State of California.

14 **FOR A TWENTY-EIGHTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

15 30. Defendant is informed and believes and upon such information and belief alleges
16 that to the extent that the claims stated in the Master Complaint have been settled, compromised,
17 or otherwise discharged, defendant is due a set-off.

18 **FOR A TWENTY-NINTH, SEPARATE AND AFFIRMATIVE DEFENSE:**

19 31. Plaintiff's claims for punitive damages are in contravention of defendant's rights
20 under each of the following constitutional provisions:

21 a. the Commerce Clause of Article I, Section 8 of the United States
22 Constitution;

23 b. the Contracts Clause of Article I, Section 10 of the United States
24 Constitution;

25 c. the prohibition against *ex post facto* laws embodied in Article I, Section 10
26 of the United States Constitution;

27 d. the Supremacy Clause of Article VI of the United States Constitution;

28 e. the Free Speech Clause of the First Amendment of the United States

1 Constitution;

2 f. the Due Process Clause of the Fifth and Fourteenth Amendments of the
3 United States Constitution;

4 g. the Takings Clause of the Fifth Amendment of the United States
5 Constitution;

6 h. the Excessive Fines Clause of the Eighth Amendment of the United States
7 Constitution;

8 i. the Equal Protection Clause of the Fourteenth Amendment of the United
9 States Constitution.

10 j. the Free Speech Clause of Article I, Section 2 of the Constitution of the
11 State of California;

12 k. the Due Process Clause of Article I, Section 7 of the Constitution of the
13 State of California;

14 l. the Takings Clause of Article I, Section 19 of the Constitution of the State
15 of California;

16 m. the Excessive Fines Clause of Article I, Section 17 of the Constitution of the
17 State of California; and

18 n. the Equal Protection Clause of Article I, Section 7 of the Constitution of the
19 State of California.

20 **FOR A THIRTIETH, SEPARATE AND AFFIRMATIVE DEFENSE:**

21 32. With respect to plaintiff's demand for damages, defendant specifically incorporates
22 by reference any and all standards or limitations regarding the determination and enforceability of
23 damage awards which arose in the decision of *BMW of North America v. Gore*, 116 U.S. 1589
24 (1996).

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26 **FOR A THIRTY-FIRST, SEPARATE AND AFFIRMATIVE DEFENSE:**

27 33. Defendant alleges that in all matters complained of, it did what might reasonably be
28 expected of a person and/or entity of ordinary prudence, acting under similar circumstances, who

1 desired to comply with the law.

2 **FOR A THIRTY-SECOND, SEPARATE AND AFFIRMATIVE DEFENSE:**

3 34. Defendant alleges that plaintiff's claims are barred by additional defenses that may
4 arise during the course of this litigation and which it reserves the right to assert based upon further
5 investigation and discovery.

6 WHEREFORE, defendant prays as follows:

7

8 1. That plaintiff take nothing by virtue of the Master Complaint;

9 2. For judgment in its favor;

10 3. For all costs of suit incurred herein; and

11 4. For such other and further relief as the court may deem just and proper.

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13 Haight, Brown & Bonesteel, L.L.P.

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15 By _____
16 David C. McGovern
17 Office of Phentermine Defendants' Liaison
18 Counsel

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DEMAND FOR JURY TRIAL

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Defendant demands a trial by jury on all causes of action and issues which may, under the law, be so tried.

HAIGHT, BROWN & BONESTEEL, L.L.P.

By _____
David C. McGovern
Office of Phentermine Defendants' Liaison
Counsel

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Liaison Counsel for
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STATE OF CALIFORNIA)
) ss.:
COUNTY OF LOS ANGELES)

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 1620 26th Street, Suite 4000 North, Santa Monica, California 90404-4038.

On July 22, 1998, I served on interested parties in said action the within:

PHENTERMINE DEFENDANTS' MASTER ANSWER TO PLAINTIFFS' MASTER COMPLAINT; DEMAND FOR JURY TRIAL

by placing a true copy thereof enclosed in sealed envelope(s) addressed as stated on the attached mailing list and causing such envelope(s) to be deposited in the U.S. Mail at Santa Monica as stated on the attached mailing list.

I am "readily familiar" with this firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day in the ordinary course of business. I am aware that on motion of party served, service is presumed invalid if postal cancellation date or postage meter date is more than 1 day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.

Executed on the 22nd day of July, 1998, at Santa Monica, California.

Brenda C. Stewart

PROOF OF SERVICE LIST

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