

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

ALLISON NELSON, on behalf of herself and all others similarly situated,      CASE NO. 09-61625-CIV-COHN/SELTZER

Plaintiff,

v.

MEAD JOHNSON NUTRITION  
COMPANY and MEAD JOHNSON &  
COMPANY,

Defendants.

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**DEFENDANT MEAD JOHNSON & COMPANY'S  
ANSWER TO COMPLAINT AND AFFIRMATIVE DEFENSES**

Subject to its affirmative defenses, without waiving any rights, privileges or defenses, Defendant Mead Johnson & Company ("MJC"),<sup>1</sup> by and through its attorneys Carlton Fields P.A. and Paul, Hastings, Janofsky & Walker LLP, hereby responds to Plaintiff's Complaint as follows:

**NATURE OF THE ACTION**

1. Answering Paragraph 1 of the Complaint, MJC admits that it produces, markets and sells Enfamil® LIPIL®.

2. Answering Paragraph 2 of the Complaint, MJC admits that it refers to its proprietary blend of docosahexaenoic acid ("DHA") and arachidonic acid ("ARA"), two nutrients found in breast milk, in the manner incorporated into its formula and as delivered to infants, as LIPIL®. MJC further admits that in certain promotional materials it has made claims

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<sup>1</sup> Mead Johnson Nutrition Company was dismissed from this case by Court order following its Motion to Dismiss for Lack of Personal Jurisdiction. Consequently, no claims against Mead Johnson Nutrition Company remain.

that certain clinical studies suggest that DHA and ARA promote brain and eye development in infants. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 2 of the Complaint.

3. Answering Paragraph 3 of the Complaint, MJC admits that Enfamil® LIPIL® enjoys brand recognition. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 3 of the Complaint.

4. Answering Paragraph 4 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

5. Answering Paragraph 5 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

6. Answering Paragraph 6 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

#### **JURISDICTION AND VENUE**

7. Answering Paragraph 7 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

8. Answering Paragraph 8 of the Complaint, MJC admits that it is authorized to conduct business in this district and has marketed, distributed and sold Enfamil® LIPIL® in this district. The balance of the allegations in Paragraph 8 constitute conclusions of law to which MJC need not respond.

#### **PARTIES**

9. Answering Paragraph 9 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegations contained in said paragraph, and on that basis denies each and every allegation contained therein.

10. Answering Paragraph 10 of the Complaint, Mead Johnson Nutrition Company has been dismissed from this case. Therefore, MJC denies, generally and specifically, each and every allegation contained therein.

11. Answering Paragraph 11 of the Complaint, MJC admits that it is a Delaware corporation with its principal place of business in Evansville, Indiana, and that it markets and sells Enfamil® LIPIL®. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 11 of the Complaint.

### **DEFENDANTS' UNLAWFUL CONDUCT**

12. Answering Paragraph 12 of the Complaint, MJC is without sufficient knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

13. Answering Paragraph 13 of the Complaint, MJC admits that LIPIL® is a blend of DHA and ARA as incorporated into MJC's formulas and as delivered to infants, and that DHA and ARA are two fats that are naturally found in breast milk. MJC further admits that it has claimed that certain clinical studies suggest that DHA and ARA promote brain and eye development in infants. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 13 of the Complaint.

14. Answering Paragraph 14 of the Complaint, MJC admits that Mead Johnson Nutrition Company filed the prospectus to which this paragraph refers and which is available from the Securities and Exchange Commission's document archive and states that the document speaks for itself. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 14 of the Complaint.

15. Answering Paragraph 15 of the Complaint, MJC admits that Mead Johnson Nutrition Company filed the prospectus to which this paragraph refers and which is available from the Securities and Exchange Commission's document archive and states that the document speaks for itself. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 15 of the Complaint.

16. Answering Paragraph 16 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

17. Answering Paragraph 17 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

18. Answering Paragraph 18 of the Complaint, MJC admits that certain versions of the label found on product packaging for Enfamil® LIPIL® have stated, in part, that Enfamil® LIPIL® is the "Only Brand Clinically Proven to Improve Visual and Mental Development" versus earlier versions of Enfamil® without DHA and ARA, measured at certain endpoints. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 18 of the Complaint.

19. Answering Paragraph 19 of the Complaint, MJC admits that certain print advertisements for Enfamil® LIPIL® have contained the statements "only Enfamil® has LIPIL®, our blend of DHA and ARA, important nutrients found in breast milk," and "it's the only formula shown in published independent clinical studies to [i]mprove brain development [and] [i]mprove eye development." Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 19 of the Complaint.

20. Answering Paragraph 20 of the Complaint, MJC admits that certain print advertisements for Enfamil® LIPIL® have stated "[C]hoose Enfamil® LIPIL®-the only infant

formula that's clinically proven to improve vision.” MJC further admits that certain print advertisements for Enfamil® LIPIL® have contained an image labeled “Visual acuity at 12 months,” and that the image has been divided with one half labeled “20/41 Vision – Without LIPIL®” and the other half labeled “20/28 Vision-With LIPIL®.” Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 20 of the Complaint.

21. Answering Paragraph 21 of the Complaint, MJC admits that its website, [www.enfamil.com](http://www.enfamil.com), have contained the following statements:

- Q: What are fatty acids? Why are they important for my baby's development?
- A: . . . Only Enfamil® has LIPIL®, our blend of DHA and ARA, important nutrients that promote brain and eye development.
- Q: What are DHA and ARA?
- A: . . . Only Enfamil® has LIPIL®, our blend of DHA and ARA, important nutrients also found in breast milk that promote brain and eye development.
- Q: How does my baby get DHA and ARA?
- A: . . . After birth, DHA and ARA are found in breast milk and Enfamil® formulas. Only Enfamil® has LIPIL®, a blend of DHA and ARA, important nutrients that support brain and eye development.

Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 21 of the Complaint.

22. Answering Paragraph 22 of the Complaint, MJC admits that Enfamil® LIPIL® contains DHA and ARA. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 22 of the Complaint.

23. Answering Paragraph 23 of the Complaint, MJC admits that one direct mailer sent to certain people contained the following statements:

- En-Fact: Enfamil® LIPIL®'s unique formulation is not available in any store brand.
- It may be tempting to try a less expensive store brand, but only Enfamil® LIPIL® is clinically proven to improve brain and eye development.
- Store brands may cost less, but Enfamil® gives your baby more.

Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 23 of the Complaint.

24. Answering Paragraph 24 of the Complaint, MJC admits that Enfamil® LIPIL® is not the only brand of infant formula that contains DHA and ARA. MJC is without sufficient knowledge to admit that other brands contain the same quantities of DHA and ARA as Enfamil® LIPIL® and therefore denies that allegation. With the exception of the allegations addressed above, MJC denies each and every allegation contained in Paragraph 24 of the Complaint.

25. Answering Paragraph 25 of the Complaint, MJC admits that the National Advertising Division of the Council of Better Business Bureaus (“NAD”) has issued decisions regarding MJC products. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 25 of the Complaint.

26. Answering Paragraph 26 of the Complaint, MJC admits Abbott Nutrition filed complaints with the NAD alleging that certain statements made by MJC in advertisements for Enfamil® LIPIL® were misleading and that the NAD requested that MJC discontinue or modify the use of certain statements in advertising for Enfamil® LIPIL®. Those statements are not at issue in this litigation. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 26 of the Complaint.

27. Answering Paragraph 27 of the Complaint, MJC admits that the NAD issued the decision attached to the Complaint as Exhibit E and that the document speaks for itself. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 27 of the Complaint.

28. MJC admits that PBM Products, LLC (“PBM”), filed a suit against MJC in or about 2000. MJC further admits that PBM filed a suit against MJC in or about 2002. Except as expressly admitted above, MJC denies each and every allegation contained in Paragraph 28 of the Complaint.

29. Answering Paragraph 29 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

30. Answering Paragraph 30 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

31. Answering Paragraph 31 of the Complaint, MJC need not respond as the paragraph contains only the heading “Plaintiff’s Allegations” and contains no substantive content.

32. Answering Paragraph 32 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

33. Answering Paragraph 33 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

34. Answering Paragraph 34 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

35. Answering Paragraph 35 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

36. Answering Paragraph 36 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

37. Answering Paragraph 37 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

38. Answering Paragraph 38 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

#### **CLASS ALLEGATIONS**

39. Answering Paragraph 39 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

40. Answering Paragraph 40 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

41. Answering Paragraph 41 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.



42. Answering Paragraph 42 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

43. Answering Paragraph 43 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation that plaintiff is willing and prepared to serve the Court and the proposed class in a representative capacity and, as a result, denies that allegation. With that exception, MJC denies, generally and specifically, each and every allegation contained in Paragraph 43.

44. Answering Paragraph 44 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

45. Answering Paragraph 45 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

46. Answering Paragraph 46 of the Complaint, this is a legal conclusion to which MJC need not respond.

47. Answering Paragraph 47 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

48. Answering Paragraph 48 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

49. Answering Paragraph 49 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

50. Answering Paragraph 50 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

51. Answering Paragraph 51 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

52. Answering Paragraph 52 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

**COUNT I**

**For Violations of Florida's Deceptive  
and Unfair Trade Practices Act,  
Fla. Stat. 501.201 *et seq.***

53. Answering Paragraph 53 of the Complaint, MJC incorporates by reference its responses to paragraphs 1 through 52 of the Complaint as though fully set forth herein.

54. Answering Paragraph 54 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

55. Answering Paragraph 55 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

56. Answering Paragraph 56 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

57. Answering Paragraph 57 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

58. Answering Paragraph 58 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

59. Answering Paragraph 59 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

60. Answering Paragraph 60 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

61. Answering Paragraph 61 of the Complaint, this paragraph constitutes a legal conclusion to which MJC need not respond.

## **COUNT II**

### **For False and Misleading Advertising, Fla. Stat. § 817.41**

62. Answering Paragraph 62 of the Complaint, MJC incorporates by reference its responses to paragraphs 1 through 61 of the Complaint as though fully set forth herein.

63. Answering Paragraph 63 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

64. Answering Paragraph 64 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

65. Answering Paragraph 65 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

66. Answering Paragraph 66 of the Complaint, MJC is without knowledge or information to form a belief as to the truth of the allegation contained in said paragraph, and on that basis denies each and every allegation contained therein.

67. Answering Paragraph 67 of the Complaint, MJC denies, generally and specifically, each and every allegation contained therein.

68. Answering Paragraph 68 of the Complaint, this paragraph constitutes a legal conclusion to which MJC need not respond.

[69-75 Dismissed from case]

**AFFIRMATIVE DEFENSES**

**FIRST AFFIRMATIVE DEFENSE**

**(Failure to State a Cause of Action)**

1. Neither the Complaint, nor any purported claim alleged therein, states facts sufficient to constitute a cause of action against MJC.

**SECOND AFFIRMATIVE DEFENSE**

**(Plaintiff Lacks Standing)**

2. As a further separate and affirmative defense, MJC alleges that the named Plaintiff fails to satisfy the prerequisites for class certification and, therefore, lacks standing and cannot represent the interests of others as to each of the purported causes of action.

**THIRD AFFIRMATIVE DEFENSE**

**(Lack of Commonality)**

3. As a further separate and affirmative defense, MJC alleges that the types of claims alleged by the named Plaintiff on behalf of herself and the putative class, the existence of which is expressly denied, are matters as to which individual questions predominate and, accordingly, are not appropriate for class treatment.

**FOURTH AFFIRMATIVE DEFENSE**

**(Insufficient Class Size)**

4. As a further separate and affirmative defense, MJC alleges that the class of persons that the named Plaintiff purports to represent, the existence of which is expressly denied, is not so numerous that joinder is impracticable.

**FIFTH AFFIRMATIVE DEFENSE**

**(Claims Not Typical)**

5. As a further separate and affirmative defense, MJC alleges that the claims alleged by Plaintiff are neither common to nor typical of those, if any, of the alleged class Plaintiff purports to represent, the existence of which is expressly denied.

**SIXTH AFFIRMATIVE DEFENSE**

**(Inadequate Representative)**

6. As a further separate and affirmative defense, MJC alleges that the named Plaintiff is an inadequate representative of any alleged class of persons she purports to represent, the existence of which is expressly denied.

**SEVENTH AFFIRMATIVE DEFENSE**

**(Unjust Enrichment)**

7. As a further separate and affirmative defense, MJC alleges that the Complaint, and each and every purported claim alleged therein, is barred because any recovery from MJC would result in Plaintiff's unjust enrichment, and the unjust enrichment of the purported class she seeks to represent, the existence of which is expressly denied.

**EIGHTH AFFIRMATIVE DEFENSE**

**(Statute of Limitations)**

8. As a further, separate affirmative defense, MJC alleges that Plaintiff's Complaint is barred by the applicable statute of limitations.

**NINTH AFFIRMATIVE DEFENSE**

**(Estoppel)**

9. As a further, separate affirmative defense, MJC alleges that Plaintiff and the purported class, the existence of which is expressly denied, are equitably estopped by reason of their own conduct from recovering on the Complaint.

**TENTH AFFIRMATIVE DEFENSE**

**(Waiver)**

10. As a further, separate affirmative defense, MJC alleges that Plaintiff and the purported class, the existence of which is expressly denied, by their own conduct, have waived the claims alleged in the Complaint and, as a consequence thereof, Plaintiffs are barred from seeking the relief sought, or any relief whatsoever.

**ELEVENTH AFFIRMATIVE DEFENSE**

**(Laches)**

11. As a further, separate affirmative defense, MJC alleges that Plaintiff's inexcusable and unreasonable delay in filing and serving the Complaint has operated to the detriment and prejudice of MJC, and as a consequence thereof, Plaintiff's rights are barred by the doctrine of laches.

**TWELFTH AFFIRMATIVE DEFENSE**

**(Failure to Mitigate Damages)**

12. As a further, separate affirmative defense, MJC alleges that, to the extent Plaintiff has sustained damages, Plaintiff and the members of the putative class, the existence of which is expressly denied, have contributed in a direct and proximate manner to their own damages by failing to act reasonably and prudently to mitigate their damages. Plaintiff's damages, if any,

must be reduced by the extent to which those damages were proximately caused by Plaintiff's failure to mitigate her own damages.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**(Unclean Hands)**

13. As a further separate and affirmative defense, MJC alleges that Plaintiff and the members of the putative class, the existence of which is expressly denied, have come into this Court with unclean hands, and as a consequence thereof, they are barred from recovery.

**FOURTEENTH AFFIRMATIVE DEFENSE**

**(No Fraudulent or Unfair Business Practices)**

14. As a further separate and affirmative defense, MJC alleges that Plaintiff's claims are barred because MJC did not commit any fraudulent or unfair business act or practice.

**FIFTEENTH AFFIRMATIVE DEFENSE**

**(Justification and Privilege)**

15. As a further separate and affirmative defense, MJC alleges that the Complaint, and each any every claim alleged therein, are barred because any conduct in the Complaint allegedly performed by MJC was justified or privileged under the circumstances.

**SIXTEENTH AFFIRMATIVE DEFENSE**

**(No Damages)**

16. As a further separate and affirmative defense, MJC alleges that Plaintiff has suffered no damages as a result of MJC's alleged conduct, and is therefore barred from recovering any attorneys' fees, costs of litigation, or other expenses from MJC.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

**(No Punitive Damages)**

As a further separate and affirmative defense, MJC alleges that Plaintiff is not entitled to recover punitive or exemplary damages on any claim in the Complaint because Plaintiff has failed to allege facts sufficient to state a claim for such damages.

WHEREFORE, MJC prays for judgment as follows:

1. That no class is certified by reason of Plaintiff's Complaint;
2. That Plaintiff take nothing by reason of her Complaint, that the Complaint be dismissed in its entirety with prejudice, and that judgment be entered for MJC;
3. That Defendants be awarded all recoverable costs and; and
4. That Defendants be awarded such other and further relief as the Court deems just and proper.

/s/ Alan Rosenthal

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**CERTIFICATE OF SERVICE**

I certify that on May 11, 2010, a copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to counsel of record.

*/s/ Alan Rosenthal*