

Rollin A. Ransom [*Pro Hac Vice*]
Lauren M. De Lilly [*Pro Hac Vice*]
SIDLEY AUSTIN LLP
555 West Fifth Street, Suite 4000
Los Angeles, CA 90013
Telephone: 213.896.6047
Email: rransom@sidley.com
ldelilly@sidley.com

Bradlee R. Frazer, ISB No. 3857
D. John Ashby, ISB No. 7228
William K. Fletcher, ISB No. 7950
HAWLEY TROXELL ENNIS & HAWLEY LLP
877 Main Street, Suite 1000
P.O. Box 1617
Boise, ID 83701-1617
Telephone: 208.344.6000
Facsimile: 208.954.5200
Email: bfrazier@hawleytroxell.com
jashby@hawleytroxell.com
wfletcher@hawleytroxell.com

Attorneys For Plaintiff/Counterclaim Defendant
Bodybuilding.Com, LLC

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

BODYBUILDING.COM, LLC, a Delaware
Limited Liability Company,

Plaintiff,

vs.

PhD FITNESS, LLC, a California Limited
Liability Company; JIM STOPPANI, an
Individual,

Defendants.

Case No. 1:16-cv-00271-EJL-CWD

DECLARATION OF BRIAN RAND IN
SUPPORT OF PLAINTIFF/COUNTERCLAIM
DEFENDANT'S OPPOSITION TO
DEFENDANTS/COUNTERCLAIMANTS'
MOTION FOR PRELIMINARY INJUNCTION

PhD FITNESS, LLC, a California Limited Liability Company; JIM STOPPANI, an Individual,

Counterclaimants,

vs.

BODYBUILDING.COM, LLC, a Delaware Limited Liability Company,

Counterclaim Defendant.

DECLARATION OF BRIAN RAND

I, Brian Rand, declare as follows:

1. I submit this declaration in support of Plaintiff/Counterclaim Defendant Bodybuilding.com, LLC's ("Bodybuilding.com") Opposition to Defendants/Counterclaimants PhD Fitness, LLC's ("PhD Fitness") and Jim Stoppani's ("Stoppani") Motion for Preliminary Injunction. I have personal knowledge of the facts set forth below, and can and will testify thereto if called as a witness in this action.

2. I am the former Director of Private Label at Bodybuilding.com, a position that I held from 2011 to 2013. During that time, I was responsible for overseeing the formulation, labeling, and manufacturing process of Bodybuilding.com's private-label brands, which include Bodybuilding.com's PROTOGEN and JYM products.

3. I was introduced via e-mail to Jim Stoppani and Mike McErlane, owners of PhD Fitness, by Bodybuilding.com's then-Vice President of Digital Publishing, John Hardesty, in or around January of 2013. I understood that Hardesty made the introduction because Stoppani was considering developing a supplement that he hoped to sell in retail stores, and I had several years of experience crafting such formulas for Bodybuilding.com.

4. In early February of 2013, Stoppani and his business partner Mike McErlane, among others, came to Bodybuilding.com headquarters in Boise, Idaho to present Stoppani's proposed pre-workout formula. Although not physically present for this meeting, I was later informed by Hardesty and Martin Rosales, Bodybuilding.com's then-Vice President of Sports Nutrition, that Stoppani planned to contract with a third-party manufacturer, Adam Nutrition, to manufacture his pre-workout supplement, which he would then propose to sell as a vendor to Bodybuilding.com for resale on Bodybuilding.com's website. Hardesty and Rosales further

advised me that Stoppani's proposed pre-workout supplement formula had a poor taste and smell, did not dissolve thoroughly, the texture was granulated, and the proposed ingredients were too expensive. I later tasted Stoppani's sample supplement and independently reached the same conclusion.

5. Hardesty, Rosales, and I discussed an alternative approach, namely that Bodybuilding.com could develop a supplement with input from Stoppani, but that Bodybuilding.com would bear the responsibility of manufacturing, labeling, and selling the product as a private-label product. We also discussed that Stoppani could endorse the product by participating in Bodybuilding.com's marketing and promotional efforts for the product.

6. In March of 2013, Hardesty provided my team and me with a stylized "JYM" mark that I understand Hardesty created. My team, working in the course and scope of their employment at Bodybuilding.com and using Bodybuilding.com's equipment and assets, was responsible for creating the actual label incorporating the JYM mark. The label that my team designed did not materially change the unique font or style of Hardesty's original JYM design. Attached hereto as **Exhibit A** is a true and correct copy of the various label designs developed by my team for the JYM products, which I submitted to Bodybuilding.com's then-Chief Executive Officer Ryan DeLuca on April 11, 2013.

7. In addition to working on the label, I was also very actively involved in determining the ingredients – and the right balance of ingredients – necessary to achieve the efficacy, flavoring, thickening, and texture for the JYM products.

8. For example, because Stoppani's proposed pre-workout supplement formula was unusable and unsaleable, I needed to fundamentally rebuild the pre-workout supplement formula that ultimately became "Pre JYM." Among the active ingredient formulation changes that I

identified and for which I was responsible, and that Bodybuilding.com implemented in manufacturing Pre JYM, were the following: we added creatine hydrochloride (which was entirely absent from Stoppani's "formula"); we increased the amount of caffeine; we increased the amount of L-tyrosine; we increased the amount of citrulline malate; we increased the amount of alpha-glyceryl phosphoryl choline (since the amount in Stoppani's "formula" was too low to be efficacious); we reduced the amount of beta-alanine (since the elevated amount in Stoppani's "formula" could cause adverse side effects); we removed L-glutamine; we removed beta phenylethylamine; and we removed the probiotic. I also reworked the flavor system to address the offensive flavor and smell of Stoppani's powder. Finally, at my instigation, we used soy to instantize the amino acids, which was essential to the "mixability" and solubility of the powder when mixed with water (which was a fundamental problem with the formulation Stoppani had presented).

9. I also developed other JYM products with no contribution at all from Stoppani. For example, based on my idea and at my direction, Bodybuilding.com converted its own private-label product, Platinum Protogen, into "Pro JYM," by removing a single (and expensive) ingredient – aminogen – from the Platinum Protogen blend, and adjusting the bottle and serving size. In other words, Pro JYM was based exclusively on the formula from Platinum Protogen, which is owned by Bodybuilding.com and to which Stoppani made no contribution.

10. With respect to all of the remaining JYM products developed while I was at Bodybuilding.com, my team and I contributed substantially to determining their ingredients and finalizing their formulas. These contributions included adjusting one or more active ingredients in literally every formula that Stoppani proposed, and largely directing and determining the flavoring, thickeners, and other essential elements of each formula.

11. At my direction and working under my ultimate supervision, Bodybuilding.com's contract manufacturer began manufacturing JYM products in the summer of 2013, and Bodybuilding.com began exclusively selling JYM-branded supplements on its website on July 19, 2013. Bodybuilding.com's website pages featuring the JYM products stated that the products were "exclusive" to Bodybuilding.com and/or could be "Found Only on Bodybuilding.com."

12. My team and others at Bodybuilding.com took several other critical steps towards ensuring that the JYM products were available for sale and in compliance with all applicable regulations. For example, at its sole expense and direction, Bodybuilding.com performed California Proposition 65 testing on the JYM products; designed and developed labels for distribution of the JYM products in Canada and the European Union; contracted with graphic designers, label printers, and ingredient suppliers; and warehoused and stored all of the JYM product inventory. To my knowledge, Stoppani and PhD Fitness did not undertake any similar efforts towards bringing the JYM products to market.

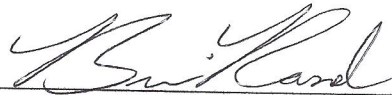
13. During my tenure as Bodybuilding.com's Director of Private Label, Bodybuilding.com did not (and would not) undertake intense development of a product that it did not own. Instead, the opposite was true. With respect to products manufactured by, and brands owned by, vendors that sell their products to Bodybuilding.com for resale on Bodybuilding.com's website, it was not Bodybuilding.com's role to develop or manufacture the vendors' labels or products; its role was to re-sell the products on its website. In contrast, I knew Bodybuilding.com to have extensive involvement in the development and manufacturing process of its own private-label brands such as the PROTOGEN and JYM supplements, which were existing and/or launched by Bodybuilding.com during my tenure there. Based on my personal

involvement in the manufacturing process for the JYM products – including designing the labels, crafting the product formulas, and supervising and directing our contract manufacturer – Bodybuilding.com engaged in the same, involved development of the JYM series that it did with its other private-label brands.

14. It is not uncommon for companies such as Bodybuilding.com to devote substantial energy and investment in developing and producing private-label brands; they are typically superior to other generic brands, less expensive to produce, and cost-friendly for consumers. Based upon my experience in the industry (which includes both my time at Bodybuilding.com and my prior employment at such companies as Vitamin Research Products and Nature's Bounty), it is often the case that the packaging for a private-label brand does not include reference to the manufacturer, even though the manufacturer owns the private-label brand. For example, Nature's Bounty manufactures and offers the following brands, many of which make no reference to Nature's Bounty on the label: Balance Bar, Solgar, Holland & Barrett, Body Fortress, Ester-C, Osteo BiFlex Joint Health, Pure Protein, Puritan's Pride, Sundown Naturals, Met-Rx, American Health, SISU, Organic Doctor, Natural Wealth, and Good'n Natural.

I declare under penalty of perjury under the laws of the United States of America and the State of Idaho that the foregoing is true and correct.

Executed on this 23 day of September, 2016 in Reno, Nevada.



Brian Rand

EXHIBIT A

From: Brian Rand </o=body/ou=exchange administrative group
(fydibohf23spdlt)/cn=recipients/cn=brian rand>
Sent: Thursday, April 11, 2013 3:24 PM
To: Ryan R. Deluca
Subject: Sneak Peak - JYM labels
Attachments: jym_creative_draft#4_c_options.pdf

Hey Ryan,

We have been jamming on the new JYM labels and wanted your feedback. (Attached are the latest mockups)

PRE = Green

Intra = Yellow

Post = Red

Let me know which concept you like the best / suggestions to improve design.

Thanks!

Brian

OPTION C 3

PDP Creative



Bottle Shape
FPO for now.

PDP Creative



— Bottle Shape
FPO for now.

PDP Creative



Bottle Shape
FPO for now.

PDP Creative



Bottle Shape
FPO for now.

