

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,
by ERIC T. SCHNEIDERMAN, Attorney General
of the State of New York,

Petitioner,

VERIFIED PETITION

-against-

Index No.: _____/2015

TOTAL TAN, INC.

Respondent.

Petitioner, the People of the State of New York, by their attorney, Eric T. Schneiderman, Attorney General of the State of New York, allege upon information and belief:

PRELIMINARY STATEMENT

1. Over the past decade, scientific evidence has increasingly documented the harms of tanning beds (referred to herein as “indoor tanning”) such that in 2009, the World Health Organization added indoor tanning to its list of most dangerous forms of cancer-causing radiation. Tanning beds were thereby placed in the international public health organization’s highest cancer risk category: “carcinogenic to humans,” the same category as tobacco.¹

2. Even more recently, in July 2014, the U.S. Surgeon General issued a “Call to Action To Prevent Skin Cancer,” a report documenting the rise in skin cancers and outlining

¹ See World Health Organization, Cancer Prevention, <http://www.who.int/cancer/prevention/en/> (last visited Feb. 20, 2015).

action steps to prevent these cancers going forward, including reduction of intentional, and unnecessary, ultraviolet (UV) light exposure for the purpose of tanning.

3. Recognizing the dangers associated with indoor tanning, New York State prohibits those under age 17 from indoor tanning and requires that 17-year-olds obtain parental consent before tanning. California, Illinois, Nevada, Oregon, Texas, Vermont, Minnesota, Louisiana, Hawaii, Delaware, Washington, the United Kingdom, Germany, Scotland, France, and several Canadian provinces have banned indoor tanning for youth under 18.² Brazil and most of Australia have banned indoor tanning beds for everyone, regardless of age.³

4. Indoor tanning increases the risk of melanoma, the deadliest form of skin cancer – responsible for 9,000 deaths in the United States each year – and also increases the risk of nonmalignant skin cancers (basal cell carcinoma and squamous cell carcinoma). While not deadly, these nonmalignant cancers – hundreds of thousands of cases each year – can cause noticeable disfigurement. In addition to increasing the risk of skin cancer, UV exposure can also harm the immune system and cause premature skin aging.

5. While the Surgeon General’s report was issued in 2014, its findings rely upon over a decade of mainstream studies using generally accepted scientific methodologies that showed a positive association between indoor tanning and melanoma.

² Nat’l Conference of State Legislatures, Indoor Tanning Restrictions for Minors - A State-by-State Comparison (updated May 2014), available at <http://www.ncsl.org/research/health/indoor-tanning-restrictions.aspx> (last visited Jun. 11, 2014); Ctrs. for Disease Control & Prevention, Is Indoor Tanning Safe?, http://www.cdc.gov/cancer/skin/basic_info/indoor_tanning.htm (last visited Jun. 10, 2014)

³ See supra n.2, Ctrs. for Disease Control & Prevention.

6. Skin cancers not only cause illness and death, but also result in treatment-related, healthcare costs of about \$8.1 billion in the United States each year. Lost workdays and restricted activity days only add to the costs.

7. While skin cancer is the most commonly diagnosed cancer in the United States, most cases are preventable. Initiating indoor tanning at younger ages increases risks for skin cancer later in life.

8. The Surgeon General recommends, as one of five goals to support skin cancer prevention, to reduce harms from indoor tanning, and, as one of five strategies to achieve that goal, the enforcement of indoor tanning laws.⁴

9. In the face of scientific evidence that has definitively shown the association between indoor tanning and early onset of skin cancer, many indoor tanning salon establishments have sought to counter the scientific evidence by purposefully advertising the opposite message: that indoor tanning actually improves health.

10. These representations send the misleading and dangerous message to consumers, including young girls who are vulnerable to the lure of tanning and most at risk, that indoor tanning is healthy.

11. Respondent Total Tan operates 29 indoor tanning salons, including 26 salons in New York State, and advertises on its website, through its Twitter account and through posters both inside its salons and affixed to salon windows, that its tanning services improve

⁴ See U.S. Dep't of Health and Human Servs. Office of the Surgeon General, THE SURGEON GENERAL'S CALL TO ACTION TO PREVENT SKIN CANCER ("SURGEON GENERAL'S CALL TO ACTION") (2014) 9, 16, available at <http://www.surgeongeneral.gov/library/calls/prevent-skin-cancer/call-to-action-prevent-skin-cancer.pdf> (last visited Feb. 20, 2015); see also supra n.2, Ctrs. for Disease Control & Prevention.

health, including that indoor tanning increases vitamin D production and is a safe source of vitamin D, prevents and treats cancer and heart disease, treats asthma, lowers blood pressure, prevents and treats diabetes, prevents blood clots, improves muscle efficiency, prevents Alzheimer's disease, provides psychological benefits, and is a safe way to avoid UV risks and prevent overexposure.

12. Respondent Total Tan also offers consumers the use of its "Mon Amie UV red light therapy" device (referred to herein as the "Mon Amie device" or "UV red light therapy") at its Latham, New York, location as well as, on information and belief, at its Blasdell, New York, and Clarence, New York, locations. The Mon Amie device looks like a tanning bed and emits both UV light and red light. Total Tan claims that its Mon Amie device will make skin appear younger and healthier, reduce wrinkles, improve skin tone and texture, control pigmentation spots, reduce pore size, and rejuvenate skin while aiding the body in producing vitamin D.

13. Additionally, Total Tan violated provisions of New York State's tanning regulations, including failing to provide customers with protective eyewear free of charge. Total Tan's use of health-related misrepresentations constitute violations of New York State deceptive practices law as well as New York Executive Law.

JURISDICTION AND PARTIES

14. This special proceeding for injunctive relief, civil penalties and costs concerns Respondent's illegal and deceptive business practice of making health-related representations about the purported benefits of indoor tanning.

15. The State brings this special proceeding pursuant to Executive Law § 63(12) and General Business Law Art. 22-A, §§ 349 and 350.

16. Executive Law § 63(12) empowers the Attorney General to seek injunctive relief, restitution, and damages when any person or business entity has engaged in repeated fraudulent or illegal acts, or has otherwise demonstrated persistent fraud or illegality in the carrying on, conducting or transaction of business. GBL §§ 349 and 350 prohibit deceptive business practices and false advertising, and empower the Attorney General to seek injunctive relief, restitution, and civil penalties when violations occur.

17. Petitioner seeks an order and judgment: (a) permanently enjoining Respondent from engaging in the deceptive, fraudulent and illegal acts and practices alleged herein; (b) pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act and false advertisement committed by Respondent; (c) pursuant to CPLR § 8303(a)(6), granting costs to the State of New York of \$2,000 against the Respondent; and (d) for such other and further relief as the court deems just and proper.

18. Petitioner is the People of the State of New York by their attorney Eric T. Schneiderman, Attorney General of the State of New York.

19. Total Tan, Inc. (“Total Tan”) or Respondent is a domestic limited liability company organized under the laws of the State of New York with its principal place of business at 3770 McKinley Parkway, Blasdell, New York 14219. Respondent operates 26 tanning salons in New York State, each of which provides indoor ultraviolet (“UV”) tanning services to consumers. Total Tan also operates three tanning salons in the State of Pennsylvania.

FACTS

Background

20. The risks of indoor tanning increasing the chance of skin cancer, especially for young people, are not in dispute in the scientific and public health communities, and have not been in dispute for some time. By 2009, the World Health Organization, having reviewed the literature and research, concluded that tanning beds presented a dangerous risk to the public and placed indoor tanning in its highest risk to human health category (carcinogenic), a category that already included tobacco.⁵

21. In 2012, in response to the scientific evidence showing that indoor tanning is particularly dangerous for younger individuals, the American Academy of Pediatrics stated, “Tanning salons are not safe and should not be used by teenagers or others.”⁶

22. With the science so clear, and the data showing dramatic increases in skin cancer in this country, the U.S. Surgeon General in July 2014 issued a detailed report on the rise of skin cancer in which indoor tanning was identified as a contributing factor to the current public health challenge. The Surgeon General included “Reduc[ing] Harms from Indoor Tanning” as one of five goals to prevent skin cancer in the future.⁷

23. Rates of melanoma have increased dramatically nationwide over the past three decades. Earlier exposure to sunlamps worsens later outcomes and exacerbates the risk of

⁵ See supra n.1.

⁶ See Am. Acad. of Pediatrics, Ultraviolet Radiation in *Pediatric Environmental Health* at 606 (Ruth A. Etzel & Sophie J. Balk eds., Oct. 2012).

⁷ SURGEON GENERAL’S CALL TO ACTION, supra n.4 at 57.

later cancers. Those who begin indoor tanning before they are 35 years old have an estimated 59% higher risk of melanoma than those who do not.

24. Since some 30% of U.S. white non-Hispanic female high school students used tanning beds in 2011, public health experts are increasingly concerned about future health consequences for this significantly sized population.

25. Recognizing the risks inherent in indoor tanning services, New York, like at least 40 other states, has implemented laws to protect its residents, including, among other protections: (i) point-of-service disclosure requirements for tanning salons, and (ii) a prohibition on indoor tanning for minors under 17 years old (17-year-olds may patronize indoor tanning salons if they obtain parental consent).

26. Local health departments, including New York City, have also taken legislative and/or regulatory action to enhance protections.

27. For example, New York City finalized rules in 2014 that aim to establish safer and more sanitary operation of tanning facilities and increase consumer awareness of indoor tanning risks.⁸

28. After convening an expert panel in 2010 to examine the scientific literature on indoor tanning, the U.S. Food and Drug Administration (“FDA”) in 2014 tightened its established rules to better communicate tanning’s dangers to consumers as well as to ensure tanning bed safety.

⁸ See N.Y.C. Health Code, Article 177, available at <http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-article177.pdf> (Last visited Feb. 20, 2015)

29. More than two decades ago, the FDA classified tanning beds as a Class I (low-risk) devices “intended to provide ultraviolet radiation to tan the skin” (in other words, for cosmetic purposes), but in light of the documented harms of indoor tanning, the FDA has changed the classification to Class II (moderate-risk) and now requires a “black box” warning sign to be posted on every tanning bed advising that individuals under 18 should not tan, and setting out other important contraindications to tanning.⁹

30. Tanning beds have never been approved by the FDA for any non-cosmetic purpose, including: to increase vitamin D levels; prevent heart disease, cancer, or other conditions; or to improve mood. However, Respondent made, and continues to make, health-related representations that go beyond the FDA’s limited approval for tanning devices.

31. Respondent, through its website (<http://www.totaltancorp.com/>), social media and through posters affixed in Total Tan salons (and visible from outside of the salons), has made and continues to make non-cosmetic, health-related representations regarding indoor tanning – including, but not limited to, statements that assert that indoor tanning increases vitamin D production and is a safe source of vitamin D, prevents and treats cancer and heart disease, treats asthma, lowers blood pressure, prevents and treats diabetes, prevents blood clots, improves muscle efficiency, prevents Alzheimer’s disease, provides psychological benefits, and is a safe way to avoid UV risks and prevent overexposure to the sun. Respondent has, at the same time, denied or minimized the known relationship between tanning and melanoma risk.

⁹ Reclassification of Ultraviolet Lamps for Tanning, 79 Fed. Reg. 31,205 (June 2, 2014); 21 C.F.R. § 878.4635 (2014).

32. Additionally, Respondent through its website, linked to external sources of information that represent purported health benefits associated with tanning.

33. Respondent's failure to disclose material facts about the risks of indoor tanning together with its misleading and false representations regarding health benefits flowing from indoor tanning constitute fraudulent and deceptive business practices and false advertising in violation of New York law.

Total Tan's Marketing

34. Total Tan operates 26 retail tanning salons in New York. The locations of the salons are as follows:

Auburn
217 Grant Ave.
Auburn, NY 13021

Gates
2000 Chili Ave.
Gates, NY 14624

N. Syracuse
709 North Main St.
N. Syracuse, NY 13212

Batavia
8400 Lewiston Rd.
Batavia, NY 14020

Greece
4433 Dewey at Latta Rd.
Greece, NY 14616

Niagara Falls
7346 Niagara Falls Blvd.
Niagara Falls, NY 14304

Blasdell
3770 McKinley Parkway
Blasdell, NY 14219

Hamburg
140 Pine St.
Hamburg, NY 14075

North Buffalo
2141 Delaware Ave.
North Buffalo, NY 14216

Cheektowaga
2563 Union Rd.
Cheektowaga, NY 14227

Harlem
4976 Harlem Rd.
Amherst, NY 14226

Olean
1863 Plaza Dr.
Olean, NY 14760

Clarence/Williamsville Transit
7660 Transit Rd.
Clarence, NY 14221

Johnstown
211 North Comrie Ave.
Johnstown, NY 12095

Orchard Park
3213 Southwestern Blvd.
Orchard Park, NY 14127

Colonie
1770 Central Ave.
Colonie, NY 12205

Kenmore
3669 Delaware Ave.
Kenmore, NY 14217

Penfield
1601 Penfield Rd.
Penfield, NY 14625

Depew
6363 Transit Rd.
Depew, NY 14043

Latham
664 New Loudon Rd.
Latham, NY 12110

Saratoga Springs
177 Ballston Rd.
Saratoga Springs, NY 12866

Dewitt
3409 Erie Blvd. East
Dewitt, NY 13214

Lockport
5754 South Transit Rd.
Lockport, NY 14094

West Amherst
3035 Niagara Falls Blvd.
Amherst, NY 14228

East Aurora
134 Grey St.
East Aurora, NY 14052

Malta
14 Kendall Way
Malta, NY 12020

35. Total Tan's marketing channels – its website, Twitter account and posters in its locations – have contained a host of misleading health-related representations regarding the benefits associated with, and the safety of indoor tanning.

36. From at least December 2012 through August 2013, Total Tan's website contained representations touting the health benefits and safety associated with tanning, but minimizing the known relationship between tanning and melanoma risk.

37. From at least December 2012 through the present, Total Tan has represented health benefits and safety associated with the Mon Amie UV red light device even though this device does not have FDA approval.¹⁰

38. From at least December 2012 through August 2013, Total Tan's website also provided links to other websites and on-line materials that assert the health benefits of indoor tanning.

¹⁰ On October 10, 2012, the FDA sent a warning letter to PC Tan regarding its marketing of KBL Brand Devices including the Mon Amie. Affirmation of Kathryn M. DeLuca, dated April 23, 2015 ("DeLuca Aff."), Ex. 3. The FDA warned PC Tan that it was marketing these devices without marketing clearance or approval, in violation of the Federal Food, Drug, and Cosmetic Act. *Id.* The FDA informed PC Tan that these devices are adulterated under section 501(f)(1)(B) of the Act, 21 U.S.C. § 351(f)(1)(B), and misbranded under section 502(o) of the Act, 21 U.S.C. § 352(o).

39. From at least March 2013 to the present, posters in Total Tan salons have contained representations touting the health benefits and safety associated with tanning, but minimizing the known relationship between tanning and melanoma risk.

40. In or around the August 2013, after it was notified by the Attorney General that the its website contained false and misleading health claims, Total Tan revised its website at least twice, first by removing a health-related testimonial, some other health-related information, and all information related to the Mon Amie device, and later by redesigning the website so that the homepage no longer directly links to the (i) Total Tan pages with health-related information, and (ii) other sources that make additional health-related representations.¹¹

41. Total Tan has refused to: (i) permanently remove the health representations from its website and the posters and other advertising in its salons; (ii) stop posting on the web and through social media channels and stop advertising in salons, any new health-related representations or links to sources that make health representations in the future; (iii) permanently stop making representations regarding the Mon Amie device on its website and in its salons; (iv) in the future, stop posting on the web and in social media and advertising in salons representations regarding the Mon Amie device; (v) stop offering the Mon Amie device and (vi) pay penalties for its past violations of law.

¹¹ While Respondent claims to have removed health representations from its website, many, but not all, of these deceptive representations are still available through internet searches that include search terms like “Total Tan Vitamin D.” See DeLuca Aff. ¶ 29, n.3.

Total Tan Falsely Denies the Link Between Tanning and Increased Cancer Risk

42. From at least December 2012 to August 2013, the Total Tan website contained numerous health-related claims that either denied or minimized the known relationship between tanning and melanoma risk. These representations included statements like “we believe that the risks associated with UV light have been overstated and the benefits ignored.”¹²

43. In direct contradiction to these assertions, the prevailing scientific evidence establishes a clear link between artificial UV exposure and melanoma. The leading national medical organizations, including the American Medical Association, the American Academy of Pediatrics, the American Cancer Society, and the American College of Physicians, were and are unanimous in recognizing the cancer risks associated with indoor tanning.

44. The American Academy of Dermatology, in direct contradiction to the statements asserted by Total Tan, has called for a complete ban on indoor tanning.¹³

45. As recognized by the Surgeon General’s July 2014 Report, research has consistently shown that indoor tanning increases the risk of developing basal cell carcinoma, squamous cell carcinoma, and melanoma.¹⁴

46. Recognizing the association between indoor tanning and cancer, and the dangers of tanning at an early age, at least 41 states have passed laws that restrict or regulate

¹² See DeLuca Aff. Ex. 6 at 43 (Total Tan website captured on Mar. 28, 2013).

¹³ Sophie Julia Balk, M.D.; David E. Fisher, M.D., Ph.D.; Alan C. Geller MPH, RN; & Martin A. Weinstock, M.D., Ph.D., Evaluation of Indoor Tanning Health Claims (March 2015) (“Expert Report”), filed contemporaneously herewith attached to the Joint Affidavit of Sophie Julia Balk, M.D., David E. Fisher, M.D., Ph.D., Alan C. Gellar MPH, RN, and Martin A. Weinstock, M.D., Ph.D. (March 2015) ¶ 7.

¹⁴ SURGEON GENERAL’S CALL TO ACTION, supra n.4 at 15.

indoor tanning, including New York. In particular, New York State law mandates that patrons be notified of the link between tanning and cancer.

47. For example, the “Tanning Hazards Information Sheet,” which New York salons must provide to all patrons so that they “can make an informed judgment about indoor tanning and the use of tanning facilities,” specifies the following health risks associated with tanning: “skin cancer, burns and injury to the skin and eyes, premature aging of the skin, allergic reactions, worsen existing medical conditions, immune suppression.”¹⁵

48. In 2014, the FDA issued a final order reclassifying sunlamps used in tanning beds from low-risk (class I) to moderate-risk (class II) devices. The order also requires that sunlamp products carry a visible black-box warning on the device that explicitly states that the sunlamp product should not be used on persons under the age of 18 years. In addition, certain marketing materials for sunlamp products and UV lamps must include additional and specific warning statements and contraindications including “Persons repeatedly exposed to UV radiation should be regularly evaluated for skin cancer.”¹⁶

49. Also in 2014, the FDA issued a consumer update setting forth that: “Using sunlamp products such as tanning beds or tanning booths increases the risk of skin damage, skin

¹⁵ 10 NYCRR § 72-1.8(b); N.Y. State Dep’t of Health, Tanning Hazards Information Sheet, [available at https://www.health.ny.gov/publications/8510.pdf](https://www.health.ny.gov/publications/8510.pdf). (last visited Feb. 20, 2015)

¹⁶ As required by the 2014 FDA regulations, 21 C.F.R. § 1040.20(d)(1)(i), every sunlamp must have a label/warning statement affixed on it with the words:

DANGER —Ultraviolet radiation. Follow instructions. Avoid overexposure. As with natural sunlight, overexposure can cause eye and skin injury and allergic reactions. Repeated exposure may cause premature aging of the skin and skin cancer. WEAR PROTECTIVE EYEWEAR; FAILURE TO MAY RESULT IN SEVERE BURNS OR LONG-TERM INJURY TO THE EYES. Medications or cosmetics may increase your sensitivity to the ultraviolet radiation. Consult physician before using sunlamp if you are using medications or have a history of skin problems or believe yourself especially sensitive to sunlight. If you do not tan in the sun, you are unlikely to tan from the use of this product.

cancer and eye injury [...]. A particularly dangerous result is melanoma, the deadliest type of skin cancer.”¹⁷

Total Tan Misleads Consumers in its Representations Regarding the Benefits of Vitamin D, and Other Purported Health Benefits

50. From at least December 2012 through August 2013, Total Tan also made a series of misrepresentations about indoor tanning’s association with vitamin D production on its website and Twitter account. Such representations included a testimonial from “cancer survivor Kurt Hollis” where he purportedly treated his kidney cancer by tanning at Total Tan’s Malta location.¹⁸ This testimonial was only removed as a result of the Attorney General’s investigation.¹⁹

51. Total Tan posted vitamin D information on its Twitter account including, for example, the following “tweets”:

- March 13, 2013 and September 20, 2012: “Tanning Fact! A Tanning unit can produce as much Vitamin D as drinking 100 glasses of milk! Wow!!!”
- December 17, 2012: “Vitamin D is a [sic] crucial for the human body”
- November 26, 2012: “Study links Vitamin D to cancer prevention”
- October 26, 2012: “Vitamin D: How to maintain healthy levels during winter”²⁰

52. Additionally, Total Tan makes representations regarding vitamin D and tanning at its salon locations. At the Latham location, a poster stating “Vitamin D made here” is

¹⁷ FDA, Indoor Tanning Raises Risk of Melanoma: FDA Strengthens Warnings for Sunlamp Products (May 29, 2014) <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm350790.htm>.

¹⁸ DeLuca Aff. Ex. 6 at 44-45.

¹⁹ DeLuca Aff. ¶ 29.

²⁰ DeLuca Aff. Ex. 1.

affixed in the window so that it is visible from the parking lot.²¹ Other posters are displayed inside the Latham and Colonie locations with messages such as “Tanning is Smart,” tanning promotes healthy bones, and listing many health benefits of tanning including preventing cancer, reducing depression, and improving mood.²²

53. Given the proven risks, well-known at the time of these representations, indoor tanning is not a safe way to obtain vitamin D.

54. Moreover, none of the representations are true.

55. There are significant limitations on the effectiveness of vitamin D production from indoor tanning. The body produces vitamin D in response to UVB exposure – not UVA exposure (the kind of UV emitted from most sunlamps).

56. Even with sunlamps that do emit UVB, research shows that only a limited amount of vitamin D can be obtained before levels plateau.

57. Thus, modern tanning beds, particularly with repeated use, will therefore not stimulate the production of vitamin D equivalent to 100 glasses of milk (10,000 international units of vitamin D) as asserted by Total Tan in the Kurt Hollis testimonial that appeared on the Total Tan website as well as its “tweets.”

58. Moreover, it is safer to increase your levels of vitamin D through dietary supplementation. Dietary supplementation of vitamin D is identical to what is produced by UV exposure – all without the associated risk of cancer. Studies that demonstrate beneficial health

²¹ Affidavit of Jessica Stout, dated March 31, 2015 (“Stout Aff”) ¶ 6, Ex. A.

²² Id. ¶¶ 7, 16; Affidavit of Lisa McDevitt, dated April 26, 2013 (“McDevitt Aff.”) ¶ 2.

effects of vitamin D almost always use oral vitamin D supplements to evaluate the effect of vitamin D, not UV exposure.

59. The Total Tan website also includes headings with links to other websites asserting not only general benefits flowing from increased vitamin D production, but also misrepresenting that vitamin D production from indoor tanning will assist in an array of serious diseases including preventing cancer and heart disease, treating asthma, lowering blood pressure, preventing and treating diabetes, preventing blood clots, improving muscle efficiency, and preventing Alzheimer's disease.²³ A selection of Total Tan's links are reproduced below with Total Tan's web site headings in quotes:

- "Sunshine and Asthma" <http://www.bbc.co.uk/news/health-22570859>
- "Sunshine and BP" <http://www.caribbean360.com/index.php/news/684290.html#axzz2SzU2oh68>
- "Tanned Women Live Longer" <http://www.dailymail.co.uk/health/article-1335364/Tanned-women-live-longer-say-scientists-Lund-University-Sweden.html>
- "New Kidney Function Tied to Vitamin D Status" <http://www.medpagetoday.com/Nephrology/KidneyTransplantation/38167>
- "Improve Muscle Efficiency" <http://www.sciencedaily.com/releases/2013/03/130317221446.htm>
- "UVB Exposure May Boost Low Vitamin D" <http://www.medpagetoday.com/MeetingCoverage/AAD/37666>
- "Vitamin D may help prevent Alzheimer's" http://www.upi.com/Health_News/2013/03/05/Vitamin-D-may-help-prevent-Alzheimers/UPI-75631362465703/
- "Recent Vitamin D News. Supplements or Sunshine?" <http://thechart.blogs.cnn.com/2013/02/26/task-force-evidence-for-vitamin-d-calcium-supplements-lacking/>

60. Total Tan's website also linked to the Vitamin D Council's website (www.vitamincouncil.org), which contains a host of vitamin D-related health claims.

²³ DeLuca Aff. Ex. 7 (articles, headings, and links from Total Tan's website as of Jun. 18, 2013).

61. Total Tan's website also touted the vitamin D-related benefits of the Mon Amie device, claiming

Not only does the Mon Amie help to rejuvenate the skin, but it also aids the body in producing the essential sunshine Vitamin D. Vitamin D is responsible for reducing high blood pressure, infection and the risk of Thrombosis, which is a blood clot formed inside a blood vessel. Proper levels of Vitamin D also aid in the prevention of more than 20 different types of cancers.²⁴

62. Although vitamin D is an important nutrient for bone health, studies have not established a clear link between vitamin D and other health conditions.²⁵ And in light of the overwhelming evidence linking UV exposure and cancer, Total Tan's claim that indoor tanning prevents cancer is especially deceptive.

63. While there is some research suggesting a link between sunlight exposure and risk of colon, prostate, and breast cancers as well as non-Hodgkin's lymphoma, the scientific data is still inconclusive, and exposure to UV radiation emitted through tanning beds has not been found to be disease-protective.²⁶

64. As the accompanying expert report explains, two different wavelengths of UV light can tan the skin, UVA and UVB. However, the body produces vitamin D in response to UVB exposure -- not UVA exposure. Sunlamps produce intermittent UV exposure for just minutes at a time, and emit a different mix of UV radiation than the usual solar spectrum.

²⁴ DeLuca Aff. Ex. 6 at 30.

²⁵ See Expert Report, supra n.13, ¶¶ 48(indoor tanning has not been shown to treat asthma), 49-50 (indoor tanning is not an established or safe way to lower blood pressure or treat hypertension), 51 (indoor tanning does not prevent or treat diabetes), 52 (indoor tanning does not prevent blood clots), 53 (indoor tanning does not improve muscle efficiency), 45 (indoor tanning does not help prevent Alzheimer's).

²⁶ Id. ¶¶ 42-47.

65. Because most tanning beds emit UVA light, not UVB light, most tanning beds do not cause the body to produce vitamin D. Thus, Total Tan's reference to vitamin D production resulting sunlight is misleading because tanning beds do not produce vitamin D in the same way that exposure to natural sunlight might.

66. Older sunlamps may emit some UVB, but even if sunlamps emit UVB, research shows that the amount of vitamin D produced by the body varies depending on the particular device and individual. In any event, only a limited amount of vitamin D is produced by the body before vitamin D levels plateau and do not increase with additional time spent in tanning beds.

67. Thus, modern tanning beds, even with repeated use, will not stimulate significant production of vitamin D.

68. Total Tan's website stated "While tanning facilities in the United States are equipped to deliver cosmetic tans using protocol designed to minimize the risk of sunburn, we know that clients come to facilities for more than just a good tan; they also enjoy the positive psychological and physiological effects of regular exposure to ultraviolet light."²⁷

69. There is no generally accepted scientific evidence to support Total Tan's assertion that indoor tanning can effectively address psychological problems. Moreover, even if indoor tanning increases serotonin levels, there are far safer ways to improve mood that do not place consumers at risk for cancer and other serious health-related consequences.

²⁷ DeLuca Aff. Ex. 6 at 35.

70. Promoting these purported benefits of indoor tanning is additionally misleading because, even if true, Total Tan fails to disclose that indoor tanning poses carcinogenic and other health risks, and that vitamin D can be safely obtained through diet and supplements.

71. All of the health representations made by Total Tan are non-cosmetic in nature and go beyond the limited FDA approval of tanning devices for cosmetic purposes.

Total Tan Represents That Indoor Tanning Is Safer Than Tanning Outdoors

72. From at least December 2012 to August 2013, Total Tan has falsely asserted through its website that indoor tanning is safer than tanning outdoors, making tanning healthy, including stating the following:

- “The professional indoor tanning industry’s scientifically supported position is summed up in this declaration: Moderate tanning, for individuals who can develop a tan, is the smartest way to maximize the potential benefits of sun exposure while minimizing the potential risks associated with either too much or too little sunlight.”
- “The risks of UV light exposure, on the other hand, are mainly associated with sunburn and overexposure (particularly among individuals who are fair-skinned or genetically predisposed to skin damage) and are easily managed by practicing sunburn prevention.”

73. Like its other statements asserting the healthfulness of tanning, there is no evidence to substantiate Respondent’s claims.

74. Total Tan’s representations that indoor tanning is “the smartest way to maximize the potential benefits of sun exposure while minimizing the potential risks associated with either too much or too little sunlight” are also not borne out by the evidence: the UV output of tanning devices is much greater than what is found in natural sunlight, and the bulbs in

tanning beds have a wide variety of UV output, often not understood by tanning bed operators, who then place patrons at risk.

75. What is more, all of the health representations made by Total Tan are non-cosmetic in nature and go beyond the limited FDA approval of tanning devices for cosmetic purposes.

76. The Surgeon General's 2014 Report directly conflicts with Total Tan's assertions of healthfulness and safety, urging that it is "important to shatter the myth that tanned skin is a sign of health." The Surgeon General is clear: "[A] 'base' tan is not a 'safe' tan. Tanned skin is damaged skin. Understanding the risk of UV exposure is crucial to protecting ourselves and our loved ones."²⁸

77. In summary, Total Tan has made and continues to make misrepresentations in its various marketing channels that indoor tanning can assist in countering a wide array of diseases and conditions (or links to sources making health representations), and has neither agreed to remove them, nor to refrain from adding any new health-related representations or links to sources that make health-related representations in the future.

Total Tan Omits the Risks of Indoor Tanning in its Advertising

78. In addition to its affirmative misrepresentations, Total Tan also fails to mention a variety of risks associated with indoor tanning. These not only include the increased risk of skin cancers, but also of premature skin aging, immune suppression, and eye damage.

²⁸ SURGEON GENERAL'S CALL TO ACTION, supra n.4 at iii.

79. Even general statements like “[t]he professional indoor tanning salon industry seeks to be part of the solution in the ongoing battle against sunburn by teaching people how to identify a proper [sic] and practical life-long skin care regimen” mislead consumers into believing that indoor tanning is without risks – even protective – when the research demonstrates just the opposite.

80. Indeed, with no mention of risks and only representations of indoor tanning’s health benefits, Respondent misleads consumers in urging them to purchase tanning services.

81. What is more, Total Tan presses consumers to engage in more frequent tanning – creating more health risks for consumers – through its monthly memberships that allow consumers the opportunity for “unlimited UV tanning” at prices starting at \$9.95 per month with a one-year commitment. Even without a membership, one tanning session at Total Tan is a mere \$7.

82. Total Tan offers discounts to students in the form of “Student Perks” entitling students to “30 Consecutive Days of UV Tanning” for \$17.95.

83. Respondent misleads consumers by not disclosing the risks inherent in the service. These omissions are heightened by Total Tan’s “discount” deals that lure consumers into believing that tanning carries no risk, and that unlimited or frequent tanning is safe.

Total Tan’s Employees Provide False and Misleading Information to Customers

84. On March 22, 2014, a representative from the Office of the Attorney General of the State of New York visited the Total Tan locations at 664 New Loudon Road,

Latham, New York 12110 and 1770 Central Avenue, Colonie, New York 12205. At both locations, Total Tan employees minimized the risks of indoor tanning and/or made health representations in connection with indoor tanning.

85. At the Colonie location, a female employee stated that “[o]nly burning is bad for your skin.” She also stated that tanning “cures cancer on the inside of the body. Like radiation for cancer treatment, [tanning] will kill any dangerous cells.”²⁹

86. At the Latham location, a Total Tan employee told the representative that “only excessive tanning damages the skin” when asked whether or not the representative’s skin would be damaged during tanning.³⁰

87. The employee at the Latham location also made representations regarding the Mon Amie device, explaining that it “tighten[s] skin, reduce[s] pore size, reduces fine lines, and is good for the skin.”³¹

Total Tan Misrepresents That the Mon Amie Device Benefits Skin

88. Total Tan’s website represented that the Mon Amie device is a 45 bulb unit with 22 “standard UV lamps” and 23 “Collagen Plus” lamps “to repair and rebuild the collagen depositories within the skin.” Total Tan promises customers that “[w]ith the unique option to turn off the tanning lamps, you can use the Mon Amie for the sole purpose of healing.”³²

²⁹ Stout Aff. ¶¶ 18, 24.

³⁰ Id. ¶ 8.

³¹ Id. ¶ 12.

³² DeLuca Aff. Ex. 6 at 26.

89. Total Tan’s website made the following representations regarding the Mon Amie device, none of which are substantiated by evidence:

- “The hardened and broken down collagen deposits can be refilled through the special light of the Mon Amie.”
- “The Mon Amie emits red light, which is absorbed by the mitochondria of the cell. This stimulates intracellular energy transfer production for enhanced cell vitality and permeability, increased production of new collagen, and increased turnover of collagen and elastin fibers.”
- “Through the use of the Mon Amie, the skin is able to store more moisture providing a more youthful and healthy glow. Winkles in the face and neck will be remodeled.”
- “The Mon Amie will also improve skin tone and texture, control pigmentation spots, help reduce pore size, encourage vibrant, healthier looking skin, and reduce wrinkles. It also increases flexibility of the connective tissue in the body.”³³

90. In a segment that appeared to air on local television and is viewable online, Total Tan touted the benefits of the Mon Amie device. Total Tan recommends that customers use the Mon Amie device for at least two to three twenty minute sessions for at least ten weeks to see results – without ever substantiating the representations or mentioning the risks associated with the UV exposure.³⁴

Total Tan Violated New York State Tanning Laws

91. New York recognizes the dangers inherent in tanning.

92. N.Y. Public Health Law § 3555(2) sets forth restrictions and requirements for the use of ultraviolet tanning devices, including prohibiting tanning by minors under the age

³³ Id. at 28-29.

³⁴ “Total Tan Grand Opening on Winging It,” <https://www.youtube.com/watch?v=L6p-WQRhqqc> (posted Jul. 13, 2012; last visited Apr. 1, 2015).

of 17 and requiring tanning salons to have parental consent forms for tanning patrons 17 years of age.

93. State regulations promulgated pursuant to N.Y. Public Health Law § 3555(2) set forth, among other protections, that tanning salons must provide to all patrons with adequate protective eyewear at no additional charge to patrons not possessing their own protective eyewear.³⁵

94. On March 5, 2013 a representative from the Office of the Attorney General of the State of New York visited Respondent's tanning salon located at 664 New Loudon Road, Latham, New York, 12110. The representative inquired about protective eyewear and was informed that the salon provided eyewear at an additional cost. The Total Tan employee informed the representative that reusable goggles could be purchased for four dollars and disposable foil stickers could be purchased for fifty cents per pair.³⁶

95. On March 20, 2015, another representative from the Office of the Attorney General of the State of New York visited Respondent's tanning salons located at 664 New Loudon Road, Latham, New York, 12110 and 1770 Central Avenue, Colonie, New York 12205. The representative inquired about protective eyewear and was informed by employees at the Latham and Colonie locations that eyewear was provided at an additional cost. The Total Tan employees at both locations informed the representative that reusable goggles could be

³⁵ 10 NYCRR § 72-1.10.

³⁶ McDevitt Aff. ¶ 5.

purchased without string for four dollars or with string for six dollars, and disposable foil stickers could be purchased for one dollar per pair.³⁷

96. Thus, Respondent failed to provide protective eyewear at no additional charge in violation of 10 NYCRR 72-1.10.

**FIRST CAUSE OF ACTION PURSUANT
TO EXECUTIVE LAW § 63(12): ILLEGALITY
VIOLATIONS OF GBL § 350**

97. GBL § 350 declares unlawful any false advertising in the conduct of any business, trade or commerce or in the furnishing of any service in this State.

98. By reason of the practices set forth in paragraphs 20 through 96, Respondent has repeatedly or persistently engaged in false advertising in violation of GBL § 350.

99. Therefore, Respondent has violated Executive Law § 63(12) by engaging in repeated or persistent illegal conduct in the carrying on, conducting or transaction of business.

**SECOND CAUSE OF ACTION PURSUANT
TO EXECUTIVE LAW § 63(12): ILLEGALITY
VIOLATIONS OF GBL § 349**

100. GBL § 349 declares unlawful any deceptive acts or practices in the conduct of any business, trade or commerce in this state.

³⁷ Stout Aff. ¶¶ 11, 19.

101. By reason of the practices set forth in paragraphs 20 through 96, Respondent has repeatedly or persistently engaged in deceptive business practices in violation of GBL § 349.

102. Therefore, Respondent has violated Executive Law § 63(12) by engaging in repeated or persistent illegal conduct in the carrying on, conducting or transaction of business.

**THIRD CAUSE OF ACTION PURSUANT
TO EXECUTIVE LAW § 63(12): FRAUD**

103. Executive Law § 63(12) defines “fraud” or “fraudulent” to include “any device, scheme or artifice to defraud and any deception, misrepresentation, concealment, suppression, false pretense, false promise or unconscionable contractual provisions.”

104. By reason of the practices set forth in paragraphs 20 through 96, Respondent has engaged in repeated fraudulent acts, or persistent fraud in the carrying on, conducting or transaction of business, in violation of Executive Law § 63(12).

**FOURTH CAUSE OF ACTION PURSUANT
TO EXECUTIVE LAW § 63(12): ILLEGALITY
VIOLATIONS OF N.Y. PUBLIC HEALTH LAW § 3555(2)
AND TITLE 10 NYCRR PART 72,
SUBPARTS 72-1.8 AND 72-1.9**

105. N.Y. Public Health Law § 3555(2) requires tanning salons to have and use the state-prescribed parental consent forms for tanning patrons 17 years of age and younger. The regulations set out at 10 NYCRR Part 72 provide the rules governing tanning salons, including age verification, posting of warning signs and provision of protective eyewear.

106. By reason of the practices set forth in paragraphs 20 through 96, Respondent has repeatedly and persistently violated Public Health Law § 3555(2) and regulations at 10 NYCRR Part 72 governing tanning facility operations.

107. Therefore, Respondent has violated Executive Law § 63(12) by engaging in repeated or persistent illegal conduct in the carrying on, conducting or transaction of business.

WHEREFORE, the State demands an order and judgment against respondent as follows:

- (a) Permanently enjoining Respondent from engaging in the deceptive, fraudulent and illegal acts and practices alleged herein;
- (b) Pursuant to GBL § 350-d, imposing a civil penalty of \$5,000 for each deceptive act committed by Respondent;
- (c) Pursuant to CPLR § 8303(a) (6), granting costs to the State of New York of \$2,000 against Respondent; and
- (d) For such other and further relief as the court deems just and proper.

Dated: New York, New York
April 23, 2015

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York
Attorney for Petitioner

LISA LANDAU
Health Care Bureau Chief

By: 

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VERIFICATION

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

Kathryn DeLuca, being duly sworn, deposes and says: She is an Assistant Attorney General in the office of Eric T. Schneiderman, Attorney General of the State of New York, and is duly authorized to make this verification.

She has read the foregoing petition and knows the contents thereof, and the same is true to her own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters she believes them to be true.

The reason this verification is not made by petitioner is that petitioner is a body politic. The Attorney General is its statutory representative.

Sworn to before me this
23rd day of April, 2015



KATHRYN DELUCA
Assistant Attorney General
of the State of New York



REBECCA A. FROMER
NOTARY PUBLIC-STATE OF NEW YORK
No. 02FR6298218
Qualified in New York County
My Commission Expires March 10, 2018