

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.

PORTOFINO SPAS, LLC,

Respondent.

Petitioner, the People of the State of New York, by their attorney, Eric T. Schneiderman, Attorney General of the State of New York (the “State” or “NYAG”), 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 built upon over a decade of mainstream studies using generally accepted scientific methodologies that showed a positive relationship 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 Portofino operates five indoor tanning salons in New York City and has advertised on its website, through its Facebook page and Twitter account, that there is no association between tanning and skin cancer, that its tanning services actually improve

⁴ See U.S. DEPARTMENT OF HEALTH AND HUMAN SERVICES 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; reduces heart disease, diabetes, multiple sclerosis and many cancers; and treats seasonal affective disorder.

12. Additionally, Portofino violated provisions of New York State's tanning statute and regulations, including failing to provide customers with current state-required forms, as well as failing to post the mandated warning signs near all tanning devices. Portofino's use of health-related misrepresentations and its violation of New York State's tanning statute and regulations constitute violations of New York State's deceptive practices law.

JURISDICTION AND PARTIES

13. 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.

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

15. Executive Law § 63(12) empowers the NYAG to seek injunctive relief, restitution, disgorgement 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 NYAG to seek injunctive relief, restitution, and civil penalties when violations occur.

16. 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.

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

18. Portofino Spas, LLC (“Portofino” 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 462 West Broadway, New York, New York 10012. Respondent has five wholly owned subsidiaries that operate as tanning salons in Manhattan, New York. All five of the Portofino wholly owned subsidiaries provide indoor ultraviolet (“UV”) tanning services to consumers.

FACTS

Background

19. 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

20. 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

21. 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

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

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

24. 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

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.

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).

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

26. 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

27. After convening an expert panel in 2010 to examine the scientific literature on indoor tanning, the 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.

28. More than two decades ago, the FDA initially approved tanning beds as 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 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

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](http://www.nyc.gov/html/doh/downloads/pdf/about/healthcode/health-code-article177.pdf) (Last visited Feb. 20, 2015).

⁹ Reclassification of Ultraviolet Lamps for Tanning, 79 Fed. Reg. 31205 (June 2, 2014); 21 C.F.R. § 878.4635 (2014).

29. 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.

30. Respondent, through its website (<http://www.portofinosun.com/>), Twitter page (<https://twitter.com/PortofinoSun>), and Facebook page (<https://www.facebook.com/PortofinoSun>), 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; reduces heart disease, diabetes, multiple sclerosis and many cancers; and that it treats seasonal affective disorder. Respondent has, at the same time, denied or minimized the known relationship between tanning and melanoma risk.

31. Additionally, Respondent, through its website, Twitter account and Facebook page, links to external sources of information that also misrepresent the health benefits associated with tanning.

32. 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.

Portofino's Marketing

33. Portofino currently operates five retail tanning salons in New York City under the "Portofino Sun Center" brand.¹⁰ The locations of the salons – all in Manhattan – are as follows: Upper East Side - 1300 Third Avenue, New York, NY 10021; Upper West Side - 104 W. 73rd Street, New York, NY 10023; Midtown – 48-50 West 56th Street, 2nd Floor, New York, NY 10019; Murray Hill - 560 3rd Avenue, New York, NY 10016; and Soho - 462 West Broadway, New York, NY 10012.

34. Portofino has three main marketing channels – its website, a Facebook page and a Twitter account – all of which have contained a host of misleading health-related representations regarding the benefits associated with, and the safety of, indoor tanning.

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

36. From at least December 2012 through August 2013, Portofino's website provided links to other websites and on-line materials that asserted the health benefits of indoor tanning.

¹⁰ During the course of the Attorney General's investigation, the number and location of Portofino tanning salons changed. When the investigation commenced, there were five tanning salons: 1) Upper East Side - 1300 Third Avenue, New York, NY 10021; 2) Upper West Side - 104 W. 73rd Street, New York, NY 10023; 3) Midtown - 47 West 57th Street, 4th Floor, New York, NY 10019; 4) Murray Hill - 560 3rd Avenue, New York, NY 10016; and 5) Soho - 462 West Broadway, New York, NY 10012. Portofino subsequently relocated its Midtown location to 48-50 West 56 Street, 2nd Fl., New York, NY 10019 and opened locations at Second Ave - 1568 Second Ave, New York, NY 10028 and Chelsea - 55 West 21st St., New York, NY 10010, bringing the total number of tanning salons to seven. As of the commencement of this lawsuit, the Second Ave and Chelsea locations have closed, such that Portofino appears to currently own five salons.

37. Portofino started “tweeting” on Twitter on October 6, 2009, and as early as March 2010 began “tweeting” about the health benefits associated with indoor tanning.

38. Portofino joined Facebook on December 9, 2009, and as early as March 2010 began posting representations about the health benefits associated with tanning.

39. In or around August 2013, after it was notified by the NYAG that its on-line marketing contained false and misleading health claim, Portofino revised its website by removing some of the health-related representations associated with tanning, as well as the links to other sources that make additional health-related representations.¹¹

40. However, Portofino continues to advertise using health-related representations on its website.¹²

41. Likewise, Portofino continues to advertise using health-related representations through other marketing channels, including its Twitter and Facebook pages, and has removed only a handful of those statements after the NYAG began investigating its business practices. Id.

42. Portofino has refused to: (i) permanently remove the health representations from its website, Twitter or Facebook pages; (ii) stop posting any new health-related representations or links to sources that make health representations in the future; and (iii) pay penalties for its past violations of law.

¹¹ While Respondent claims to have removed health representations from its website, these deceptive representations are still available through internet searches that include search terms like “Portofino - Vitamin D.” See Affirmation of Brant Campbell, dated April 22, 2015 (“Campbell Aff.”) ¶ 29.

¹² See Campbell Aff. Ex. 9 (breakdown setting out which Portofino’s misleading representations have been removed from its website and social media, and which misleading representations remain).

Portofino Falsely Denies the Link Between Tanning and Increased Cancer Risk

43. From at least December 2012 to August 2013, the Portofino website contained numerous health-related claims that either denied or minimized the known relationship between tanning and melanoma risk. These representations included the following:¹³

- “There actually is no clear direct experimental evidence showing a causative mechanism between tanning and melanoma. Even the American Academy of Dermatology admits this.”
- “Conflicting data exist questioning the UV-melanoma relationship. Some independent dermatology researchers question whether UV and melanoma are related at all.”
- “[M]elanoma is more common in indoor workers and on parts of the body that don’t get regular sun exposure: both of which could not be true if UV exposure was a direct cause of melanoma.”

44. In direct contradiction to these assertions, the prevailing scientific evidence established 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, have been unanimous in recognizing the cancer risks associated with indoor tanning.

45. The American Academy of Dermatology, in direct contradiction to the statements asserted by Portofino above (see supra ¶ 43), has called for a complete ban on indoor tanning.¹⁴

¹³ See Campbell Aff. Ex. 10 at 2-3.

¹⁴ 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. (April 11, 2015), ¶ 7.

46. 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.¹⁵

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

48. 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.”¹⁶

49. 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

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

¹⁶ 10 NYCRR § 72-1.8(b); New York State Department 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)

warning statements and contraindications including “Persons repeatedly exposed to UV radiation should be regularly evaluated for skin cancer.”¹⁷

50. 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 cancer and eye injury [...]. A particularly dangerous result is melanoma, the deadliest type of skin cancer.”¹⁸

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

51. From at least December 2012 (i) through August 2013 (for representations on Portofino’s website), or (ii) through present (for almost all representations on Twitter and Facebook), Portofino also made a series of misrepresentations about indoor tanning’s association with vitamin D production on its website, Twitter account and Facebook page. Such representations included the following:

- “[I]ndoor tanning is an excellent, reliable source of Vitamin D. During a typical tanning session your body naturally creates as much Vitamin D as you

¹⁷ 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.

¹⁸ U.S. Food and Drug Administration, *Indoor Tanning Raises Risk of Melanoma: FDA Strengthens Warnings for Sunlamp Products*, May 29, 2014, <http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm350790.htm>.

would get from drinking 100 glasses of milk or eating 25 servings of salmon.”¹⁹

- “[S]tudies have shown . . . that indoor tanners have 90% higher levels of vitamin d and that the vast majority of tanners have sufficient levels.”²⁰
- “Dr. William Grant stated in his study, ‘There is conclusive evidence that indoor tanning in a non-burning fashion offers a tremendous source of vitamin D. The benefit of regular UV exposure as the body’s only true natural source of sufficient vitamin D production easily outweighs the manageable risks associated with overexposure to sunlight.’”²¹
- “With 70% of kids vitamin D deficient, will the dermatology lobby open their eyes to the benefits of tanning?”²²

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

53. Moreover, none of the representations are true.

54. 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) – and the effectiveness of various indoor tanning devices at promoting vitamin D varies with the amount of UVB emitted by a sunlamp.

55. Even with sunlamps that do emit UVB, research shows that only a limited amount of vitamin D can be obtained before levels plateau and do not increase with additional time spent in tanning beds.

¹⁹ See Campbell Aff. Ex. 10 at 4.

²⁰ Id.

²¹ Id.

²² See Campbell Aff. Ex. 2 at 5; Campbell Aff. Ex. 4 at 8.

56. 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 Portofino.

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

58. From at least December 2012 to August 2013, Portofino linked to other websites that made similar health-related representations relating to vitamin D benefits, including the following:²³

- “Vitamin D Council” – www.vitamindcouncil.org (nonprofit organization focusing on vitamin D, sun exposure and health).
- “Sunlight Institute” – www.sunlightinstitute.org (organization that promotes the health benefits of sunlight, in particular those associated with vitamin D production).
- “We are sunshine” – www.wearesunshine.com (a website that provides a directory of “Smart Tan”-affiliated tanning salons, including Portofino Sun Center, and that promotes UV tanning as an effective way to produce vitamin D).

59. Respondent not only has asserted general benefits flowing from increased vitamin D production, but has also specifically misrepresented that vitamin D production from

²³ See Campbell Aff. Ex. 10 at 1.

indoor tanning will assist in preventing an array of serious diseases including cancer, heart disease, diabetes and multiple sclerosis.

60. Often through its Twitter account and Facebook page, Portofino misrepresents the association between indoor tanning and reducing risk of contracting an array of diseases – often through the sunlamps’ purported enhancement of vitamin D. For example, the representation below is currently available on Portofino’s Facebook page (<https://www.facebook.com/PortofinoSun>) and Twitter account (<https://twitter.com/PortofinoSun>), respectively:



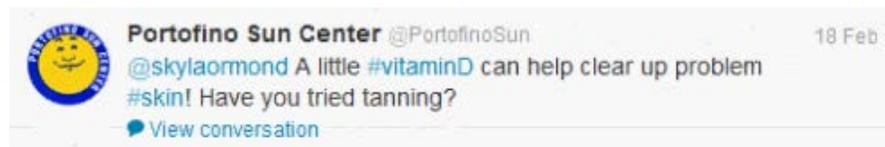
61. Although vitamin D is an important nutrient for bone health, studies have not established a clear link between vitamin D and other health conditions. And in light of the

overwhelming evidence linking UV exposure and cancer, Portofino’s claim that indoor tanning prevents cancer is especially deceptive.

62. 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.

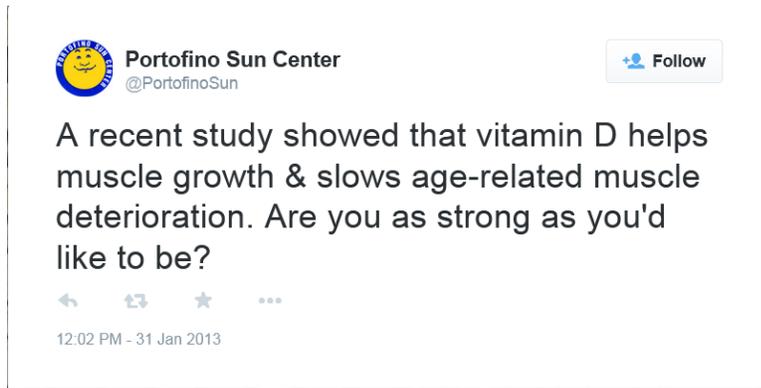
63. Sunlamps produce intermittent UV exposure for just minutes at a time, and emit a different mix of UV radiation than the usual solar spectrum.

64. Respondent has asserted an array of other “cures” offered by indoor tanning, and at one time “tweeted” on Twitter that:



65. There is no evidence that indoor tanning has any effect on “problem skin.” There is, however, clear evidence to demonstrate that indoor tanning *harms* the skin, increasing the risk of skin cancer – and leads to premature aging and wrinkles.

66. Respondent also asserts in its current marketing on both Twitter and Facebook that vitamin D helps muscle growth and slows age-related deterioration by posting the following, respectively:



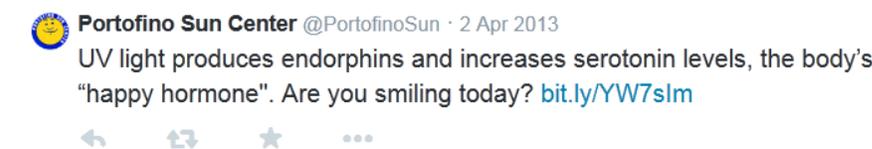
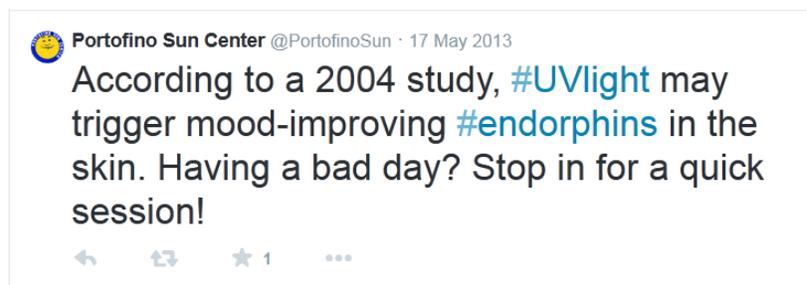
67. There is no generally accepted scientific evidence to support this claim, and Portofino provided none.

68. Portofino has made additional statements relating to indoor tanning – including on its Facebook page and Twitter account that indoor tanning, either through purported increases in vitamin D levels or serotonin levels, elevates mood:

Facebook:



Twitter:



69. There is no generally accepted scientific evidence to support Portofino’s assertion that indoor tanning is recommended as treatment by clinicians or that it can effectively address mood problems such as seasonal affect disorder (SAD), and Portofino provided none.

70. 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 consequences.

71. Other examples of Portofino's deceptive health-related representations that remain on its Facebook page and Twitter account include the following:²⁴

- "Vitamin D helps with weight loss. How are your Vitamin D levels?"
- "Are you Vitamin D deficient? Vitamin D is a hormone produced naturally when skin is exposed to UVB in sunlight..."

72. There is no scientific evidence to support the connection between vitamin D and weight loss.

73. And because most tanning beds use sunlamps that emit UVA light, not UVB light, the reference to vitamin D production resulting from UVB in sunlight is misleading.²⁵

74. Even with sunlamps that emit UVB, research shows that only a limited amount of vitamin D can be obtained because vitamin D levels plateau, and do not increase further.

²⁴ See Campbell Aff. Ex. 2 at 8, 6; Campbell Aff. Ex. 4 at 11, 9.

²⁵ Portofino offers 13 different types of tanning devices at its various salon locations. On its website (<http://www.portofinosun.com/tanning/> - last visited Feb. 20, 2015) Portofino provides descriptions for the various tanning devices available in its salons. There is only one tanning device (the "P90") with a description that makes reference to UVB or low pressure bulbs as a significant feature attributable to the tanning device. Portofino describes the P90 as having "high pressure bulbs on top and low pressure bulbs on the bottom." The descriptions for the other 12 tanning devices make no reference to UVB or low pressure bulbs so as to infer that vitamin D production in tanning patrons will likely occur.

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

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

77. Even Portofino's use of general statements like "Good health doesn't come from total sun avoidance and it doesn't come from overexposure, it comes from balancing the amount of exposure and minimizing the risk of sunburn"²⁶ misleads consumers into believing that indoor tanning is benign and without risks – even protective – when the research indicates that the opposite is true.

78. Likewise, Portofino's statement that "Tanning, unlike applying chemical sunscreen, is nature's sunscreen typically resulting in an SPF of 2 to 4 meaning you can spend 2 to 4 times as long in the sun without burning"²⁷ asserts that tanning itself is protective – like sunscreen – when tanning is a response to cellular injury caused by UV radiation.

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

²⁶ See Campbell Aff. Ex. 2 at 9; Campbell Aff. Ex. 4 at 12.

²⁷ See Campbell Aff. Ex. 10 at 4.

Portofino Represents That Indoor Tanning is Safer than Tanning Outdoors

80. From at least December 2012 to present, Portofino has falsely asserted through its website that indoor tanning is safer than tanning outdoor, making tanning “healthy,” including stating the following:

- “Control is key — and it’s only possible within the environment of a certified, indoor tanning salon. In an outdoor setting, you are likely to fall victim to unpredictable variables; cloud cover, atmospheric changes and more can make it difficult to predict how much UV exposure you’ll receive.”²⁸
- “Most people can develop a beautiful, healthy tan – without burning – but the process must be slow and deliberate, aided by certified professionals and the most advanced tanning equipment available.”²⁹
- “In many ways [indoor tanning is] just like tanning outdoors with a few additional advantages . . . Controllable: Unlike the sun, whose intensity changes depending on factors like time of day, season and weather conditions, you know how much exposure you get in an indoor tanning session.”³⁰
- “Our ability to tan is a highly evolved mechanism to help protect skin cells from getting too much UV light during the summer.”³¹

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

82. Portofino’s representations that a “controlled tanning environment” yields a more “healthful” tan are also not borne out by the evidence: the UV output of tanning devices

²⁸ See Campbell Aff. Ex 11.

²⁹ Id.

³⁰ See Campbell Aff. Ex. 10 at 1.

³¹ Id. at 2.

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 place patrons at risk.

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

84. The Surgeon General's 2014 Report directly conflicts with Portofino's assertions of healthfulness and safety, urging that it is "important to shatter the myth that tanned skin is a sign of health. And 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."³²

85. In summary, Portofino 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 has Portofino agreed to refrain from adding any new health-related representations or links to sources that make health-related representations in the future.

Portofino Omits the Risks of Indoor Tanning in its Advertising

86. In addition to its affirmative misrepresentations, Portofino 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.

³² SURGEON GENERAL'S CALL TO ACTION, supra n. 4 at iii.

87. Even general statements like “Good health doesn’t come from total sun avoidance and it doesn’t come from overexposure, it comes from balancing the amount of exposure and minimizing the risk of sunburn” mislead consumers into believing that indoor tanning is without risks – even protective – when the research demonstrates just the opposite.

88. 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.

89. What is more, Portofino presses consumers to engage in more frequent tanning – creating more health risks for consumers – through its monthly “deals” that allow consumers the opportunity for “unlimited tanning” – at prices that vary from \$69 - \$99 monthly.

90. “Students with ID” are offered specific savings as well: \$79 for a 10-session package deal.

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

Portofino Trains its Employees to Provide False and Misleading Information to Customers

92. Portofino is a member of the International Smart Tan Network,³³ which describes itself as “the leading educational trade association for professional indoor tanning facilities worldwide.”³⁴

93. Portofino uses Smart Tan training materials to train its employees. These materials include a section titled “The Anti-Tanning Lobby’s Agenda” that presents several example questions and answer scenarios regarding the safety of indoor tanning.³⁵ Portofino’s training materials recommend that employees tell customers that “to date, no research suggests that moderate tanning is a significant risk factor for anything.”³⁶

94. Portofino trains its employees that “saying ultraviolet light causes skin cancer and therefore should be avoided is like saying water causes drowning and therefore should be avoided.”³⁷ Even worse, with respect to melanoma, Portofino misstates the current research and trains its employees that “[t]his rare form of cancer is a mystery” and that “[t]he truth is that 18 of 21 studies ever conducted on this topic have shown no association between indoor tanning and melanoma.”³⁸

³³ See “Smart Tan Salons in your area,” <http://www.tanningtruth.com/?zip=10012&country=US> (last visited Feb. 20, 2015) (listing Portofino Sun Centers).

³⁴ See International Smart Tan Network, *First Impressions Certification Course* (2005), attached as Ex. 13 to the Campbell Aff. at 2.

³⁵ *Id.* at 48-53.

³⁶ *Id.* at 49.

³⁷ *Id.* at 51.

³⁸ *Id.*

95. The training materials further mislead and distract customers about the connection between tanning and skin cancer by training employees on confusing and incorrect responses to customer questions:³⁹

Beauty Magazines' Agenda

Each spring, America's beauty magazines are filled with warnings about the sun. Here's a possible response to questions generated by the beauty magazines:

- C:** Did you see this article about tanning and skin cancer? That's the second scary story I've read this month in my magazines.
- O:** Don't be fooled. Did you know that beauty magazines average about 20 pages of advertising an issue in anti-tanning skin care products? That's nearly \$1 million an issue. And if you read those articles closely they're almost always plugging self-tanning lotion.

Most tanning salons put beauty magazines in their lobbies, so expect your customers to question you about such articles. As long as cosmetic companies and SPF manufacturers make up \$1 million of advertising an issue, these magazines are going to write good things about them!

96. Portofino trains its employees to mislead customers by telling them that indoor tanning is safer than outdoor tanning and “speculate[s] that the fact that people don't receive as much regular sun exposure as they used to – which makes them more susceptible to sunburn when they do go outside – may be linked to the increase in skin cancer now.”⁴⁰

97. Even though a part of the training materials cautions “We do NOT suggest you discuss any health benefits of vitamin D with your clients,” it goes on to recommend, “But you can say it is ‘The Sunshine Vitamin’: UVB makes vitamin D.”⁴¹ These statements

³⁹ Id. at 49.

⁴⁰ Id. at 52.

⁴¹ See Smart Tan International, *Basic Technical Certification Course 12th Edition* (2008) at 61, attached as Ex. 14 to Campbell Aff.

encourage employees to mislead consumers into thinking that because sunshine causes the body to make vitamin D, indoor tanning will as well – when most sunlamps only emit UVA, which does not produce vitamin D.

Portofino Violated New York State Tanning Laws

98. New York recognizes the dangers inherent in tanning.

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

100. State regulations promulgated pursuant to New York Public Health Law § 3555(2) set forth, among other protections, that tanning salons must provide to all patrons the state-prescribed “Tanning Hazards Information Sheet” (10 NYCRR §72-1.8(b)), which provides a list of health risks associated with tanning, factors that increase a person’s risk for developing skin cancer, reasons to avoid indoor tanning, and a statement that describes the prohibition of UV tanning to persons under 17 years of age and the requirement that persons 17 years of age to have a parent or legal guardian sign a consent form before using a UV tanning device.

101. The New York law also requires that tanning salons provide the state-prescribed “Tanning Facilities Statement of Acknowledgement” form for each patron 18 years or older to sign (10 NYCRR 72-1.8(c)) acknowledging, among other things, that: UV radiation is a human carcinogen and can cause skin cancer; overexposure to UV radiation from tanning devices can cause burns and injury to the skin and eyes and other harms; that UV sensitivity may

occur if UV under certain circumstances; that the “Tanning Hazards Information Sheet” has been read; and that failure to use protective eyewear may result in severe burns or injury to the eye.

102. Finally, the New York regulations also require that tanning salons post state-required warning signs near all tanning devices setting forth (i) the maximum exposure time for the device; (ii) that failure to wear protective eyewear may result in severe burns or long-term injury to the eye; (iii) that medications or cosmetics may increase sensitivity to UV radiation; and (iv) that “If you do not tan in the sun, you are unlikely to tan from the use of this product.”⁴²

103. On or about May 1, 2013, an Investigator from the NYAG visited Respondent’s tanning salon located at 560 Third Avenue, New York, New York 10016.⁴³ The Investigator checked Respondent’s tanning salon for compliance with New York State tanning laws, and found it to be in violation of a number of New York State requirements: (1) failing to provide current (a) Facility Acknowledgement Forms, (b) Tanning Hazards Information Sheets, and (c) Parental Consent Forms, as well as (2) failing to post the state-required warning signs near all tanning devices.⁴⁴ Respondent failed to provide current Parental Consent Forms for tanning patrons 17 years of age in violation of New York Public Health Law § 3555(2), and instead provided an out-of-date form that incorrectly lists the ages for minors to tan with parental consent as 14 to 18 years of age.⁴⁵

⁴² 10 NYCRR § 72-1.9.

⁴³ See Affidavit of Investigator Robert Pompey-Goodman dated December 31, 2014 (“Pompey-Goodman Aff.”).

⁴⁴ Pompey-Goodman Aff. ¶¶ 9-14.

⁴⁵ Pompey-Goodman Aff. ¶ 13, Ex. 3.

104. Respondent failed to provide current state-prescribed “Tanning Hazards Information Sheets” to patrons in violation of 10 NYCRR 72-1.8(b), and instead provided an out-of-date sheet that did not include the section setting forth the change in the law prohibiting tanning by minors (under 17).⁴⁶

105. Respondent failed to provide current “Tanning Facilities Statement of Acknowledgement” forms for each patron 18 years or older to sign, in violation of 10 NYCRR 72-1.8(c).⁴⁷

106. Additionally, Respondent failed to post the New York State-required warning sign next to each of its UV tanning devices in violation of 10 NYCRR 72-1.9.⁴⁸

107. Respondent’s failure to provide current tanning documents to consumers and to post the State-prescribed warning sign near all of its tanning devices violates the New York statute and regulations governing tanning facility operations.

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

108. 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.

⁴⁶ Pompey-Goodman Aff. ¶ 13, Ex. 2.

⁴⁷ Pompey-Goodman Aff. ¶ 13, Ex. 1.

⁴⁸ Pompey-Goodman Aff. ¶¶ 9, 10, 12.

109. By reason of the practices set forth in paragraphs 19 through 97, Respondent has repeatedly or persistently engaged in false advertising in violation of GBL § 350.

110. 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**

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

112. By reason of the practices set forth in paragraphs 19 through 107, Respondent has repeatedly or persistently engaged in deceptive business practices in violation of GBL § 349.

113. 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**

114. 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.”

115. By reason of the practices set forth in paragraphs 19 through 107, 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 NEW YORK PUBLIC HEALTH LAW § 3555(2)
AND TITLE 10 NYCRR PART 72,
SUBPARTS 72-1.8 AND 72-1.9**

116. Pub. Health Law § 3555(2) requires tanning salons to have and use the state-prescribed parental consent forms for tanning patrons 17 years of age. 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.,

117. By reason of the practices set forth in paragraphs 98 through 107, Respondent has repeatedly and persistently violated Pub. Health Law § 3555(2) and regulations at 10 NYCRR Part 72 governing tanning facility operations.

118. 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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Assistant Attorney General
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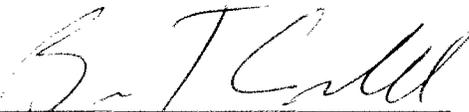
VERIFICATION

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

Brant Campbell, being duly sworn, deposes and says: He 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.

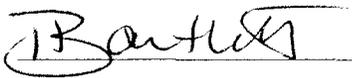
He has read the foregoing petition and knows the contents thereof, and the same is true to his own knowledge, except as to matters therein stated to be alleged on information and belief, and as to those matters he believes them to be true.

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



BRANT CAMPBELL
Assistant Attorney General
of the State of New York

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



TASHA L. BARTLETT
NOTARY PUBLIC, STATE OF NEW YORK
NO. 018488484
QUALIFIED IN QUEENS
COMMISSION EXPIRES 03/17/2015