

CAUSE NO.

STATE OF TEXAS, § IN THE DISTRICT COURT OF
Plaintiff §
§
§ TRAVIS COUNTY, TEXAS
VS. §
§
CURTIS RYAN, LYNDA RYAN, and §
TONY RYAN d/b/a EURO TAN, §
§
Defendants. § _____ JUDICIAL DISTRICT

**PLAINTIFF'S ORIGINAL PETITION AND APPLICATION FOR PERMANENT
INJUNCTION**

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, the STATE OF TEXAS, Plaintiff, acting by and through Attorney General Greg Abbott, and files this its Original Petition complaining of and against CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN (hereinafter "Defendants"), and would respectfully show the court the following:

DISCOVERY CONTROL PLAN

1. Discovery is intended to be conducted under Level 2 of Texas Civil Procedure Rule 190.

AUTHORITY

2. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted him by §431.047, and §431.0585 of the Texas Food, Drug and Cosmetic Act, TEX. HEALTH & SAFETY CODE ANN. §431.001 *et seq.* ("TFDCA"). Section

431.047 authorizes the Attorney General to seek injunctive relief under certain circumstances and recover any costs and attorney fees incurred in obtaining that relief. Section 431.0585 authorizes the Attorney General, after a referral from the Commissioner, to seek civil penalties in favor of the State for any violation of §431.021 of the TFDCA and regulations pursuant to this Act.

3. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted him by §17.47 of the Texas Deceptive Trade Practices - Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §17.41 *et seq.* (“DTPA”), upon the grounds that Defendants have engaged in false, misleading, or deceptive acts or practices in the course of trade and commerce as defined in, and declared unlawful by §§17.46(a) and (b) of the DTPA.

4. This action is brought by Attorney General Greg Abbott, through his Consumer Protection and Public Health Division, in the name of the STATE OF TEXAS and in the public interest under the authority granted him by §145.0121 of the Tanning Facility Regulation Act, TEX. HEALTH & SAFETY CODE ANN. §145.001 *et seq.* Section 145.0121 of the Tanning Facility Regulation Act specifically provides that the Attorney General may file suit to recover a civil penalty and for injunctive relief for violations under this Act.

PARTY DEFENDANTS

5. Defendant CURTIS RYAN is a resident of Texas doing business as Euro Tan. The principal place of business for CURTIS RYAN d/b/a EURO TAN is 14855 Blanco Road, Suite 412, San Antonio, Texas 78216. Defendant may be served at this address or at his place of residence at 613 Indian Scout, Spring Branch, Texas 78070.

6. Defendant LYNDA RYAN is a resident of Texas doing business as Euro Tan. The principal place of business for LYNDA RYAN d/b/a EURO TAN is 14855 Blanco Road, Suite 412, San Antonio, Texas 78216. Defendant may be served at this address or at her place of residence at 613 Indian Scout, Spring Branch, Texas 78070.

7. Defendant TONY RYAN is a resident of Texas doing business as Euro Tan. The principal place of business for TONY RYAN d/b/a EURO TAN is 14855 Blanco Road, Suite 412, San Antonio, Texas 78216. Defendant may be served at this address or at his place of residence at 12023 Ashrock Ct., San Antonio, Texas 78230.

VENUE

8. Venue of this matter is proper in Travis County pursuant to §431.047(c) and §431.0585(d) of the TFDCA, and §145.0121(d) of the Tanning Facility Regulation Act.

PUBLIC INTEREST

9. Because Plaintiff State of Texas has reason to believe that Defendants have engaged in the unlawful practices set forth herein, Plaintiff believes Defendants have caused immediate and irreparable injury, loss and damage to the State of Texas and its citizens, and have caused adverse effects to legitimate business enterprise which conducts its trade and commerce in a lawful manner in this State. Therefore, the Attorney General of the State of Texas believes and is of the opinion that these proceedings are in the public interest.

TRADE AND COMMERCE

10. Defendants are engaged in trade and commerce, as that term is defined by §17.45(6) of the DTPA, in that Defendants are or were engaged in the business of advertising and/or marketing and delivering tanning services in Texas.

NOTICE BEFORE SUIT

11. Pursuant to §17.47(a) of the Deceptive Trade Practices Act, contact has been made with the Defendants to inform them in general of the alleged unlawful conduct, by letter mailed by certified mail, return receipt requested.

ACTS OF AGENTS

12. Whenever it is alleged in this petition that Defendants did any act or thing, it is meant that Defendants performed or participated in such act or thing or that such act was performed by the officers, agents or employees of said Defendants, and in each instance, the officers, agents or employees of said Defendants that were then authorized to act did in fact act on behalf of Defendants or otherwise acted under the guidance and direction of the Defendants.

NATURE OF DEFENDANTS' OPERATION

13. Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN operate a tanning facility in San Antonio, Texas. Defendants advertise their services and solicit customers for their tanning facility through brochures and on the website www.eurotansa.com.

14. In January 2009 and November 2009, the Texas Department of State Health Services ("TDSHS") inspected Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN'S business premises.

15. As a result of these inspections and reviews of the website www.eurotansa.com on various dates, TDSHS determined that Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN were making health and medical benefit claims related to tanning devices. Some examples of the claims made on the website www.eurotansa.com include cites to

studies stating that those who are regularly exposed to ultraviolet radiation have a reduced risk of melanoma due to a tan preventing the penetration of ultraviolet radiation which, in turn, prevents the production of free radicals. Defendants stated that the reduced risk of melanoma is also due to the production of “lots” of Vitamin D. Defendants also provided a list on their website listing the areas, including autism, autoimmune illnesses, cancer, chronic pain, and general well-being, in which Vitamin D is being or has been researched to determine its benefits.

16. Some examples of claims related to tanning devices made in a brochure include, but are not limited to, lowering blood pressure, increasing Vitamin D3 production, decreasing PMS symptoms, and improving the immune system.

17. After a website review, TDSHS determined that Defendants CURTIS RYAN, LYNDA RYAN, and TONY RYAN d/b/a EURO TAN were advertising mineral wraps as being able to detoxify fat cells, producing permanent inch loss, as reducing and eliminating cellulite, and as being safe.

18. After a website review, TDSHS determined that Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN posted a webpage asking the question “Is Sunscreen *Causing* Cancer?,” advised consumers to use sunscreens responsibly, and implicitly promoted tanning to avoid the use of sunscreens.

OVERVIEW OF THE REGULATION OF TANNING DEVICES

19. Defendants use ultraviolet lamps¹ for tanning to provide tanning services to

¹By classification, ultraviolet lamps that produce ultraviolet radiation within a specific limit (21 C.F.R. §1040.20(11)) are intended for use in any sunlamp product designed to incorporate one or more ultraviolet lamps and intended for irradiation of any part of the human body to induce skin tanning (21 C.F.R. §1040.20(9)).

consumers. Ultraviolet lamps for tanning are classified in 21 C.F.R. § 878.4635 (“ultraviolet lamp for tanning is a device . . . intended to . . . tan the skin.”) and are solely classified for tanning the skin, nothing more. The Federal Food & Drug Administration (“FDA”) classifies devices based on the intended use, as presented by the device manufacturer.

20. The FDA is solely responsible for classifying and approving devices after they determine whether they are safe and effective for their stated intended uses. The State, its agencies, and its courts cannot approve or authorize use of a device for an intended use different from that authorized by FDA.² Therefore, ultraviolet lamps for tanning are limited to the intended use of tanning the skin.

21. Defendants’ tanning facility is regulated under the Tanning Facility Regulation Act, TEX. HEALTH & SAFETY CODE § 145.001 *et seq.* (Vernon 2001 & Supp. 2008). Defendants’ tanning devices are also regulated under the Texas Food, Drug & Cosmetic Act, TEX. HEALTH & SAFETY CODE §431.001 *et seq.* (Vernon 2001 & Supp. 2008) as a device.

VIOLATIONS OF THE TFDCA

22. Ultraviolet lamps for tanning are “tanning devices” pursuant to section 145.002(7) of the TFRA, TEX. HEALTH & SAFETY CODE. Tanning devices under the Tanning Facility Regulation Act are also defined as devices under section 431.002(13) of the Texas Food, Drug, and Cosmetic Act, TEX. HEALTH AND SAFETY CODE.

23. TFDCA section 431.182(a) states that an advertisement of a device is false if it is

² Section 521 of the Federal Food, Drug, and Cosmetic Act (“FFDCA”), 21 U.S.C. §360k(a), prohibits a state from establishing or continuing in effect any requirement (1) which is different from, or in addition to any requirement applicable under the FFDCA to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under the FFDCA.

false or misleading in any particular. Defendants' claims, whether made explicitly or implicitly, that tanning devices reduce the risk of cancer or other diseases are false or misleading in that the FDA has only approved tanning devices for tanning the skin and not for these other intended uses. Therefore, Defendants' claims constitute false advertisements under TFDCCA section 431.182(a).

24. Defendants' claims, whether made explicitly or implicitly, that tanning devices reduce the risk of cancer or other diseases violate TFDCCA section 431.021(f) which prohibits the dissemination of any false advertisement.

25. Section 431.112(e) of the TFDCCA states that a device shall be deemed to be misbranded unless its labeling bears adequate directions for use. Adequate directions for use cannot be written for Defendants' advertised uses of the tanning devices since these devices are not approved to deliver doses of vitamin D or reduce the risk of cancer or other diseases. Because adequate directions for use cannot be written for Defendants' tanning devices for these unapproved uses, these devices are deemed misbranded pursuant to section 431.112(e) of the TFDCCA.

26. Defendants' use of tanning devices without adequate directions for the intended use results in the misbranding of devices in commerce in violation of section 431.021(b) of the TFDCCA. In addition, Defendants' use of such misbranded devices to provide tanning services results in the introduction into commerce of misbranded devices in violation of section 431.021(a) of the TFDCCA.

27. Defendants' advertisement for mineral wraps as detoxifying fat cells, causing permanent inch loss, causing exceptional and guaranteed inch loss, reducing the appearance of cellulite and eliminating cellulite constitute structure and function claims which make the mineral

wraps devices and drugs.

28. Since the mineral wraps are devices based on the intended advertised uses, the mineral wraps require an approved application for Premarket Approval ("PMA") under section 515 of the Federal Food, Drug, and Cosmetic Act or an approved premarket notification under Section 510(k) of the Federal Food, Drug, and Cosmetic Act based on a finding of substantial equivalency. Defendants' use of the mineral wraps as devices without providing the information required by Section 510(k) is a violation of §431.021(s) of the TFDCa.

29. In addition to the mineral wraps being drugs based upon the intended advertised uses, the mineral wraps are also classified as "new drugs" within the meaning of §431.002(25) of the TFDCa because the TDSHS is unaware of any evidence that establishes that the mineral wraps are generally recognized as safe and effective for their intended uses. The sale, offer to sell, holding for sale or the giving away of any new drug is prohibited by §431.114 of the TFDCa unless the FDA has approved an application under Section 505 of the Federal Food, Drug, and Cosmetic Act for the drug. The introduction of a new drug into commerce in violation of §431.114 of the TFDCa is a violation of §431.021(e) of the TFDCa.

30. Defendants' safety claims for the mineral wraps are false and misleading since the FDA has not made any safety determination for the wraps. Additionally, Defendants' claims that the mineral wraps do not involve any water loss are misleading because some water loss is involved with the use of the wraps. Thus, these claims are in violation of §431.021(f) of the TFDCa.

VIOLATIONS OF THE TFRA

31. Section 145.007 of the TFRA prohibits a tanning facility from claiming or distributing promotional materials claiming that using a tanning device will result in medical or health benefits. A regulation adopted under the TFRA, §229.349(b) of the Tex. Admin. Code, states that “[t]he only claims that may be made for tanning are cosmetic.” Defendants have violated these provisions by claiming and/or distributing materials claiming, either explicitly or implicitly, that using a tanning device increases vitamin D production, which, in turn, reduces the risks of cancer and other diseases, lowers blood pressure, decreases PMS symptoms, increases muscle strength, improves the immune system, increases energy and endurance, lowers stress levels, and decreases seasonal disorders. Defendants have further violated this provision by implicitly claiming that persons should tan instead of using sunscreens.

VIOLATIONS OF THE DTPA

32. Defendants CURTIS RYAN, LYNDA RYAN, and TONY RYAN d/b/a EURO TAN as set forth in paragraphs 1-31 above, in the course and conduct of trade and commerce, have directly and indirectly engaged in false, misleading, deceptive and unconscionable acts and practices declared unlawful by §§17.46 (a) and (b) of the Texas Deceptive Trade Practices Act, including but not limited to §17.46(a) and the following provisions of §17.46:

- (b)(2) causing confusion or misunderstanding as to the source, sponsorship, approval, or certification of goods or services;
- (b)(5) representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits or quantities which they do not have;
- (b)(7) representing that goods or services are of a particular standard, quality, or grade, or that goods are of a particular style or model, if they are of another;
- (b)(24) failing to disclose information concerning goods or services which was known at the time of the transaction when such failure to disclose such information was intended to induce the consumer into a transaction into which the consumer

would not have entered had the information been disclosed.

INJURY TO CONSUMERS

33. By means of the foregoing unlawful acts and practices which were producing causes of injury to the persons affected, Defendants have acquired money or other property from identifiable persons to whom such money or property should be restored, or who in the alternative are entitled to an award of damages.

CONTINUING VIOLATIONS

34. Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN have violated and could continue to violate the laws as hereinabove alleged. Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN, unless restrained by this Honorable Court, could continue violating the laws of the State of Texas and injury, loss and damage will result to the State of Texas and to the general public.

PRAYER

35. WHEREFORE, PREMISES CONSIDERED, the STATE OF TEXAS prays that Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN be cited according to law to appear and answer herein; that upon final hearing a PERMANENT INJUNCTION be issued restraining and enjoining Defendants individually and by their agents, servants, employees, and representatives from making the representations, doing the acts, and engaging in the practices set out in the preceding paragraphs as well as from making the following representations and doing the following acts and engaging in the following practices in the pursuit and conduct of trade or commerce within the State of Texas as follows:

- A. Represent, market, promote, or advertise, either expressly or by implication, tanning devices as a means or method of reducing any health risks or affecting any medical conditions;

- B. Represent, market, promote, or advertise, either expressly or by implication, tanning devices as a means or method to prevent or reduce the incidences or degree of any cancers;
- C. Represent, market, promote, or advertise, either expressly or by implication, tanning devices as a means or method by which consumers can safely increase their exposure to vitamin D or increase levels of vitamin D;
- D. Represent, market, promote, or advertise, either expressly or by implication, tanning devices as anything other than devices to tan the skin;
- E. Represent, market, promote or advertise tanning devices without disclosing that the only use for tanning devices authorized by the FDA is to tan the skin;
- F. Misbrand devices in commerce;
- G. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that tanning devices are a means or method of reducing any health risks or affecting any medical conditions;
- H. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that tanning devices are a means or method to prevent or reduce the incidences or degree of any cancers;
- I. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that tanning devices are a means or method by which consumers can safely increase their exposure to vitamin D or increase levels of vitamin D;
- J. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that tanning devices are anything other than devices to tan the skin;
- K. Represent, market, promote or advertise mineral wraps as a detoxification treatment, as reducing cellulite or the appearance of cellulite, as producing inch loss unless it is clearly stated that any inch loss is temporary, as being safe or healthy, as being able to slenderize any part of the body, as being the same as or better than liposuction, as not involving dehydration or water loss, or as producing any health benefit;

- L. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that sunscreens cause cancer or are linked to detrimental health conditions;
- M. Include any statement, question, claim, research, or link to research on their website or in any other advertisement which implies, either directly or indirectly, that the use of tanning devices is better for one's health than the use of sunscreens;
- N. Disseminate any false advertisements;
- O. Introduce an unapproved new drug into commerce;
- P. Introduce a device required to have an application for premarket approval into commerce if such application is not in effect;
- Q. Represent that their business is approved by the Texas Department of State Health Services;
- R. Represent that their business is approved by the Office of the Attorney General; and
- S. Fail to provide written notice to any agent, servant, employee or representative of the existence and terms of any injunction entered in this case, and of their duty to comply with the terms set forth herein.

36. The STATE OF TEXAS further prays that upon final hearing this Court order Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN to pay civil penalties to the State of Texas up to \$25,000 per violation per day for each violation of §431.021 of the TFDCA, as provided in §431.0585(b) of the TFDCA³.

37. The STATE OF TEXAS further prays that upon final hearing this Court order Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN to pay civil

³ Defendants CURTIS RYAN and LYNDA RYAN filed, on December 29, 2008, a Chapter 13 bankruptcy in the U.S. Bankruptcy Court for the Western District of Texas, Case No. 08-53763 C. The allegations of violations in this Petition occurred after the filing of the bankruptcy. In collecting any judgment against the Defendants CURTIS RYAN and LYNDA RYAN arising out of the allegations in this Petition, the State will proceed in accordance with the applicable bankruptcy law.

penalties to the State of Texas up to \$25,000 per violation per day for each violation of §145.007 of the Tanning Facility Regulation Act, as provided in §145.0121(b) of the Tanning Facility Regulation Act.⁴

38. The STATE OF TEXAS further prays, that upon final hearing, this Court order Defendants CURTIS RYAN, LYNDA RYAN and TONY RYAN d/b/a EURO TAN to pay civil penalties of not more than \$20,000.00 per violation, as provided in §17.47(c)(1) of the DTPA.⁵

39. The STATE OF TEXAS further prays that the Office of the Attorney General and the Commissioner of Health be awarded their investigative costs, court costs, reasonable attorneys' fees, expenses, and witness fees pursuant to the laws of the State of Texas including, but not limited to, TEX. HEALTH & SAFETY CODE ANN. §431.047(d) and TEX. GOV'T CODE ANN. §402.006(c).⁶

40. The STATE OF TEXAS further prays that upon final hearing that this Court grant all other relief to which the STATE OF TEXAS may be justly entitled.

Plaintiff State of Texas

⁴See footnote 3.

⁵See footnote 3.

⁶See footnote 3.

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