NOTICE SENT: FINAL INTERLOCUTORY NONE
DISP PARTIES:
DISP CODE: CVD CLS 46628
REDACT PGS:
JUDGE ACM CLERK mvm

DC BK13067 PG462

Filed in The District Court of Travis County, Texas
MAR 08 2013
At 11:04 A.M.
Amalia Rodriguez-Mendoza, Clerk

CAUSE NO. D-1-GV-08-002596

STATE OF TEXAS, Plaintiff	§	IN THE DISTRICT COURT OF
	§	TRAVIS COUNTY, TEXAS
VS.	§	
DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; ROBBIE SEGLER, individually; TAN BIZ, LLC; MONICA JONES, individually; and JASON JONES, individually,	§	
Defendants	§	201st JUDICIAL DISTRICT
VS.	§	
JK PRODUCTS & SERVICES, INC.; JK CAPITAL, INC.; AND NHSL, INC.	§	
Third Party Defendants.	§	

FINAL JUDGMENT AND AGREED PERMANENT INJUNCTION AS TO DARQUE TAN, LLC; SEGLER ENTERPRISES LTD AND ROBBIE SEGLER, INDIVIDUALLY

Plaintiff, the STATE OF TEXAS, acting by and through the Consumer Protection Division of the Office of the Attorney General Greg Abbott ("State"), and Defendants DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; and ROBBIE SEGLER, individually, (hereafter collectively referred to as "Defendants")(The State and Defendants are collectively referred to as "the Parties") having consented to the entry of this Final Judgment and Agreed Permanent Injunction ("Judgment"), have jointly moved that the Court enter this Judgment.

The Parties consent and agree to the entry of this Judgment and agree that the terms of said agreement are fair, just and equitable. The Parties further agree that this Final Judgment and Agreed Permanent Injunction is a settlement of disputed claims, that Defendants do not admit any wrongdoing, and deny all of Plaintiff's claims. The Parties further agree that Defendants' agreement to pay consideration is merely made in an effort to resolve a dispute and is not to be

considered an admission of liability. The Parties further agree that Plaintiff's execution of this Judgment does not constitute an approval by the Plaintiff of Defendants' business practices.

DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; and ROBBIE SEGLER, individually, have read and understand this Final Judgment and Agreed Permanent Injunction and enter into it voluntarily and understand the meaning and effect of each provision of this Final Judgment and Agreed Permanent Injunction.

The Court, after reading the pleadings and stipulations of the parties and it appearing to the Court that all parties agree to and have approved its entry of this Judgment, makes the following orders under the provisions of the Tanning Facility Regulation Act, Tex. Health & Safety Code Ann. §145.001 et seq. ("TFRA"), Texas Food, Drug and Cosmetic Act, Tex. Health & Safety Code Ann. §431.001 et seq. ("TFDCA"), and the Texas Deceptive Trade Practices - Consumer Protection Act, Tex. Bus. & Com. Code Ann. §17.41 et seq. ("DTPA"). The Court is of the opinion that, in view of these findings, said agreement should be and is hereby in all things approved, and accordingly that this Judgment should be entered.

IT IS THEREFORE ORDERED, ADJUDGED and DECREED THAT:

1. This Court has jurisdiction, through the TFRA, TFDCA and the DTPA over the subject matter and over all parties to this action.

2. Plaintiff's current Petition states a claim for relief against DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; and ROBBIE SEGLER, individually.

3. 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 TFRA.

4. The following definitions shall be used in construing this Judgment:

A. "Adulterated device" means a device that meets one or more of the criteria listed in §431.111 of the TFDCA, Tex. Health & Safety Code, including but not limited to, a class III device which fails to have an approved application for premarket

approval as provided by §431.111(f) of the TFDCA.

B. "Advertise" or Advertising" means "all representations disseminated in any manner or by any means, other than by labeling, for the purpose of inducing, or that are likely to induce, directly or indirectly, the purchase of food, drugs, devices or cosmetics," as defined in §431.002(1) of the TFDCA, Tex. Health & Safety Code.

C. "Clearly and Conspicuously" means that the required disclosure is in such size, color, contrast, location, duration, and/or audibility that it is readily noticeable, readable, and understandable. A statement may not contradict or be inconsistent with any other information with which it is presented. If a statement modifies, explains, or clarifies other information with which it is presented, it must be presented in close proximity to the information it modifies, in a manner that is readily noticeable, readable, and understandable, and it must not be obscured in any manner. The required disclosure must be in understandable language and syntax.

D. "Device" is defined in §431.002 (13) of the TFDCA, Tex. Health & Safety Code, and "except when used in Sections 431.003, 431.021(1), 431.112(c) and 431.142(c), means an instrument, apparatus, implement, machine, contrivance, implant, in vitro reagent, or other similar or related article, including any component, part, or accessory, that is: (A) recognized in the official United States Pharmacopoeia National Formulary or any supplement to it; (B) intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or other animals; or (C) intended to affect the structure or any function of the body of man or other animals and that does not achieve any of its principal intended purposes through chemical action within or on the body of man or other animals and is not dependent on metabolization for the achievement of any of its principal intended purposes".

E. "False advertising" of a food, drug, device, or cosmetic means advertising that is false, deceptive, or misleading in any particular as prohibited by the TFDCA and/or the DTPA.

F. "FDA" means the Federal Food and Drug Administration.

G. "Food" is defined in §431.002 (16) of the TFDCA, Tex. Health & Safety Code, and means articles used for food or drink for man, chewing gum, and articles used as components of any such article.

H. "Misbranded device" means a device that meets one or more of the criteria listed in §431.112 of the TFDCA, Texas Health & Safety Code.

I. "Tanning device" means a device that meets the definition set forth in TFRA §145.002(7) as follows: "a device under § 431.002 of the TFDCA and includes any equipment, including a sunlamp, tanning booth, and tanning bed, that emits

electromagnetic radiation with wavelengths in the air between 200 and 400 nanometers and is used for the tanning of human skin. The term also includes any accompanying equipment, including protective eyewear, timers, and handrails." This term includes lamps classified in 21 C.F.R. §878.4635 for the intended use of tanning the skin.

J. "Tanning facility" means a facility that meets the definition set forth in TFRA §145.002(8) as follows: "a business that provides persons access to or use of tanning devices.

K. "Red light device" shall mean a device utilizing red light lamps and that requires FDA marketing clearance or premarket approval by Section 515 of the Federal Food Drug & Cosmetic Act prior to introducing the device into commerce.

L. The "Effective Date" of this Judgment shall be the date it is signed by the Court.

5. **IT IS FURTHER ORDERED THAT** Defendants DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; and ROBBIE SEGLER, individually, or any of their successors, agents, servants, employees, assigns and any other person acting in concert or participation with or on behalf of DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; or ROBBIE SEGLER, individually, shall not:

A. Advertise or represent that red light devices that are required to be but have not been cleared for marketing or have premarket approval by the FDA can be used by the general public;

B. Advertise or represent that red light devices can prevent, cure, treat, or mitigate diseases unless they have been cleared for marketing or have premarket approval by the FDA:

C. Cause confusion as to the approval of a good by advertising, offering to sell, and selling the use of services using a red light device that is required to be but has not been cleared for marketing or has premarket approval by the FDA;

D. Purchase or possess any device, including but not limited to a red light device, without verifying that the device is required to be and has been cleared for marketing or has premarket approval in the United States by the FDA;

E. Introduce or deliver for introduction into commerce a misbranded and/or adulterated red light device;

F. Represent, market, promote, or advertise, either expressly or by implication through any means: that using a tanning device is safe or free from risk or that

using a tanning device will result in medical or health benefits; that the use of tanning devices or any services associated with the use of tanning devices is a means or method to prevent or reduce the incidences or degree of any cancers; that the use of tanning devices is a means or method by which consumers can increase their exposure to vitamin D or increase levels of vitamin D or any similar type claim; that tanning devices are anything other than devices to tan the skin; or mislead consumers into thinking tanning devices can be used for anything other than tanning of the skin;

G. Include any statement, claim, research, or link to research or other websites on their website or social network site(s) which implies, either directly or indirectly, that tanning devices or any services associated with the use of tanning devices are a means or method of increasing levels of Vitamin D, reducing any health risks, or affecting any medical conditions or that tanning devices are anything other than devices to tan the skin or use any internet search parameters, such as metatags, search and source codes, to link those searching for Vitamin D, Vitamin D production; cancer prevention, breast cancer, or any other health related subject to Defendants' website(s);

H. Manufacture dietary supplements within this state without being licensed with the Texas Department of State Health Services as a food manufacturer or advertise or represent, through any means, the availability of Vitamin D supplements at any of their facilities unless it is clearly and conspicuously disclosed that the Vitamin D is obtained solely through the ingestion of a dietary supplement;

I. Fail to comply with all of the legal requirements for the operation of tanning facilities;

J. Represent that their business is approved by the Texas Department of State Health Services;

K. Represent that their business is approved by the Office of the Texas Attorney General; and

L. Fail to provide written notice to any agent, servant, employee, affiliate, representative, franchise, or licensee of the existence and terms of any injunction entered in this case which is applicable to them, and of their duty to comply with the terms set forth herein.

6. **IT IS FURTHER ORDERED THAT** Defendants DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; and ROBBIE SEGLER, individually, shall not advertise or promote Vitamin D dietary supplements through the use of billboards, television, radio, or any other means for one year following the Effective Date of this Judgment. This term does not

apply to and does not prohibit Defendants from selling or giving away Vitamin D dietary supplements within their facilities in compliance with the above terms.

7. IT IS FURTHER ORDERED THAT nothing in this judgment will preclude the Texas Department of State Health Services from pursuing destruction of the red light devices detained in this matter.

8. **IT IS FURTHER ORDERED THAT** Defendant SEGLER ENTERPRISES, LTD shall pay and deliver EIGHTY EIGHT THOUSAND DOLLARS ($88,000) to the Office of the Attorney General to be deposited into the General Revenue Fund of the State of Texas.

9. **IT IS FURTHER ORDERED THAT** SEGLER ENTERPRISES, LTD shall pay and deliver to the Office of the Attorney General FORTY FIVE THOUSAND DOLLARS ($45,000.00) as attorneys fees and investigative costs under §431.047 of the TFDCA, §145.0121 of the TFRA, and the Tex. Govt. Code § 402.006(c).

10. **IT IS FURTHER ORDERED THAT** SEGLER ENTERPRISES, LTD shall pay and deliver EIGHT THOUSAND FIVE HUNDRED TWENTY AND 44/100 DOLLARS ($8,520.44) to the Texas Department of State Health Services to cover their investigative costs pursuant to §431.047 of the TFDCA and §145.0121 of the TFRA.

11. IT IS FURTHER ORDERED THAT thirty (30) days following receipt by the State of Texas from SEGLER ENTERPRISES, LTD of the total sum of ONE HUNDRED FORTY ONE THOUSAND FIVE HUNDRED TWENTY DOLLARS AND FORTY-FOUR CENTS) ($141,520.44) which includes the aforesaid $88,000.00 (EIGHTY EIGHT THOUSAND DOLLARS), $8,520.44 (EIGHT THOUSAND FIVE HUNDRED TWENTY DOLLARS AND FORTY-FOUR CENTS) as investigative costs pursuant to §431.047 of the TFDCA and §145.0121 of the TFRA, and $45,000.00 (FORTY-FIVE THOUSAND DOLLARS) as attorneys fees and investigative costs under §431.047 of the TFDCA, §145.0121 of the TFRA,

and the Tex. Govt. Code § 402.006(c), the State of Texas shall consider the monetary portion of the Final Judgment paid, as ordered in paragraphs 8, 9, and 10 satisfied in full.

12. **IT IS FURTHER ORDERED THAT** the parties' agreement to and the Court's approval of this Final Judgment are expressly premised upon the stipulations made herein, as relied upon by the parties in negotiating and agreeing to the terms of this Final Judgment.

13. **IT IS FURTHER ORDERED** that each party shall bear its own costs of court, but that the money paid in paragraph 8 above includes payment for the State's filing costs.

14. The clerk of the Court is authorized to issue such writs of execution or other process necessary to collect and enforce this Judgment.

15. The Court retains jurisdiction to enforce this Judgment.

16. It is agreed and understood that this Judgment shall in no way affect the rights of individual citizens.

17. It is agreed and understood that this Judgment is a settlement of disputed claims, that Defendants do not admit any wrongdoing, and that Defendants deny all of Plaintiff's claims. Any agreement to pay consideration is merely made in an effort to resolve a dispute. As such, this Judgment and its contents shall in no way affect the rights of any Defendants to retain or renew their existing licenses or to apply or be granted new licenses, as long as they are in compliance with this Judgment and state law at the time of licensing. This Judgment and its contents shall in no way be used to enhance any current or future penalties or fines against any of the Defendants since the Court has not made any finding of violations prior to settlement by the Defendants or any of the laws, regulations, or rules referred to herein. However, this Judgment, its contents, and the facts surrounding this matter may be introduced into evidence in a subsequent unrelated court action under TFDCA Section 431.0585(c) against any of the Defendants.

18. A copy of a signature hereon shall be as effective as an original.

19. All relief not granted herein is hereby denied.

Signed this 8th day of March, 2013.

DISTRICT JUDGE

THE UNDERSIGNED, WHO HAVE THE AUTHORITY TO CONSENT AND SIGN ON BEHALF OF THE PARTIES IN THIS ACTION, HEREBY CONSENT TO THE FORM AND CONTENTS OF THE FOREGOING FINAL JUDGMENT AND AGREED PERMANENT INJUNCTION AND TO ITS ENTRY:

Signed this 22nd day of February, 2013.

DEFENDANTS DARQUE TAN, LLC; SEGLER ENTERPRISES, LTD; ROBBIE SEGLER, individually.

By: _____ President
on behalf of DARQUE TAN, LLC

By: _____ CEO
on behalf of SEGLER ENTERPRISES, LTD.

By: _____
ROBBIE SEGLER, individually

THE UNDERSIGNED EXECUTES SOLELY IN CAPACITY AS ATTORNEYS FOR DEFENDANTS

Date: 3/4/13

Attorney for Defendants

EDWARD D. ("ED") BURBACH
SBN 03356250
Gardere Wynne Sewell LLP
600 Congress Avenue, Suite 2900
Austin, Texas 78701-2978
ph: (512) 542-7070
fax: (512) 542-7270
eburbach@gardere.com

Date: March 5, 2013

Plaintiff State of Texas

GREG ABBOTT
Attorney General of Texas

DANIEL T. HODGE
First Assistant Attorney General

JOHN SCOTT
Deputy Attorney General for Civil Litigation

TOMMY PRUD'HOMME
Chief, Consumer Protection Division

JOYCE WEIN ILIYA
Managing Attorney, Health Team

PATRICIA STEIN
Assistant Attorney General
State Bar No. 24033222
Consumer Protection Division
1412 Main Street, Suite 810
Dallas, Texas 75202
Phone: (214) 969-7639, ext. 8816
Facsimile: (214) 969-7639

Attorneys for the State