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 DISTRICT COURT
 WESTERN DIVISION
 SAN FRANCISCO, CALIF.
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FILED

11 IN THE UNITED STATES DISTRICT COURT
 12 FOR THE CENTRAL DISTRICT OF CALIFORNIA
 13 WESTERN DIVISION

14 CALIFORNIA TAN, INC.,
 15 Plaintiff/Counterclaim Defendant,
 16 vs.

17 BODY SOURCE, LTD., d/b/a
 18 THESUPPLENET.COM; LARRY
 SAGARIN; and DOES 1 through 10,
 19 inclusive,
 20 Defendants/Counterclaim Plaintiffs

Case No.: CV04-1052 DT (FMOx)

ANSWER, AFFIRMATIVE DEFENSES AND COUNTERCLAIMS FOR:

1. Declaratory Relief; and
2. Injunctive Relief for Violation of Cal. Bus. & Prof. Code § 17200

DEMAND FOR JURY TRIAL "BY FAX"

ANSWER

22 Defendant S&L Vitamins, Inc., incorrectly named as Body Source Ltd., and
 23 defendant Larry Sagarin, by and through their undersigned attorneys, for their answer to
 24 the Complaint by plaintiff California Tan, Inc., respond as follows:

NATURE OF THE CASE

- 26 I. Denied.

1 **JURISDICTION AND VENUE**

2 2. Admitted.

3 3. Admitted.

4 4. Admitted.

5 5. Admitted.

6 **PARTIES**

7 6. Defendants lack knowledge and information sufficient to admit or deny this
8 allegation.

9 7. Denied.

10 8. Denied, except admitted that Mr. Sagarin operates TheSuppleNet.com as an
11 employee of S & L Vitamins, Inc.

12 9. Denied.

13 10. Defendants neither admit nor deny the statements in this numbered paragraph
14 because it contains no allegations which require a response from defendant.

15 **CALTAN'S ALLEGED INTELLECTUAL PROPERTY RIGHTS**

16 11. Denied except that the fact of the registration of the alleged marks is admitted.

17 12. Defendants lack knowledge and information sufficient to admit or deny this
18 allegation.

19 13. Defendants lack knowledge and information sufficient to admit or deny this
20 allegation.

21 14. Defendants lack knowledge and information sufficient to admit or deny this
22 allegation.

23 15. Defendants lack knowledge and information sufficient to admit or deny this
24 allegation.

25 16. Defendants lack knowledge and information sufficient to admit or deny this
26 allegation.

27 17. Defendants lack knowledge and information sufficient to admit or deny this
28 allegation.

1 **DEFENDANTS' ALLEGED ACTS**

2 18. Denied.

3 Second 18. Defendants admit that for a limited time, TheSuppleNet.com displayed
4 photographs which accurately depicted the products sold on its website, and which were
5 reproduced from plaintiff's website. Defendants deny that the displayed photographs were
6 misappropriated from Plaintiff's website.

7 19. Denied.

8 **FIRST CLAIM FOR RELIEF**

9 20. Defendants repeat their responses to the corresponding incorporated allegations.

10 21. Defendants lack knowledge and information sufficient to admit or deny this
11 allegation.

12 22. Denied.

13 23. Denied.

14 24. Denied.

15 25. Denied.

16 **SECOND CLAIM FOR RELIEF**

17 26. Defendants repeat their responses to the corresponding incorporated allegations.

18 27. Admitted.

19 28. Defendants lack knowledge and information sufficient to admit or deny this
20 allegation.

21 29. Admitted.

22 30. Denied.

23 31. Admitted.

24 32. Denied.

25 33. Denied.

26 34. Denied.

27 35. Denied.

28 36. Denied.

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THIRD CLAIM FOR RELIEF

- 37. Defendants repeat their responses to the corresponding incorporated allegations.
- 38. Denied.
- 39. Denied.
- 40. Denied.
- 41. Denied.
- 42. Denied.
- 43. Denied.
- 44. Denied.

FOURTH CLAIM FOR RELIEF

- 45. Defendants repeat their responses to the corresponding incorporated allegations.
- 46. Denied.
- 47. Denied.
- 48. Denied.
- 49. Denied.

FIFTH CLAIM FOR RELIEF

- 50. Defendants repeat their responses to the corresponding incorporated allegations.
- 51. Denied.
- 52. Denied.
- 53. Denied.
- 54. Denied.
- 55. Denied.

SIXTH CLAIM FOR RELIEF

- 56. Defendants repeat their responses to the corresponding incorporated allegations.
- 57. Denied.
- 58. Denied.

SEVENTH CLAIM FOR RELIEF

- 59. Defendants repeat their responses to the corresponding incorporated allegations.

1 undersigned attorneys, for its counterclaim against defendant California Tan, Inc., alleges as
2 follows:

3 **THE PARTIES**

4 1. Defendant / counterclaim plaintiff S & L Vitamins, Inc., ("S & L"), is a New
5 York corporation with a principal place of business at 308 East Montauk Highway,
6 Lindenhurst, New York. S & L does business as "Body Source."

7 **JURISDICTION AND VENUE**

8 2. This Court has subject matter jurisdiction under 15 U.S.C.S. § 1121, 28 U.S.C.S.
9 §1331, and 28 U.S.C.S. §1338(a), in that this case arises under the trademark laws of the
10 United States, 15 U.S.C.S. §1125(a), and on 28 U.S.C. §2201, the Federal Declaratory
11 Judgment Act.

12 3. Subject matter jurisdiction is further founded on 28 U.S.C. §1367(a) as a matter
13 under the Court's supplemental jurisdiction over state law claims so related to the federal issues
14 in the action that they form part of the same case or controversy.

15 4. Personal jurisdiction over Defendant is vested in this Court because the claims
16 alleged arise from acts and conduct by defendant, a California resident, and because Defendant
17 has availed itself of California law.

18 5. Venue is proper in this Court pursuant to 28 U.S.C. §1121 (b) and (c), because a
19 substantial portion of the harm sought to be avoided, and a substantial part of the events and
20 omissions which give rise to the claims alleged herein are occurring in and about this District.

21 **FACTS**

22 6. Body Source operates an Internet website which provides consumers with the
23 opportunity to purchase, at discount prices, various products including nutritional and
24 performance-enhancing supplements, located at www.TheSuppleNet.com ("SuppleNet.com").

25 7. Body Source's website operates on a technological and electronic commerce
26 platform contracted from Yahoo! Small Business Merchant Solutions, a service of Yahoo!, Inc.
27 ("Yahoo!").

28 8. Yahoo! is the No. 1 Internet brand globally and attracts the largest audience

1 worldwide, over 237 million unique users per month. Yahoo! has become the Internet's leading
2 global business services company, offering a comprehensive network of essential services for
3 businesses of all sizes. Yahoo!'s corporate mission is to represent Internet best-practices and
4 expertise.

5 9. According to Yahoo!, "The five-star Top Service icon next to a store's name is a
6 sign of superlative quality. It means that the store is participating in our Merchant Rating
7 System, and customers who have ordered from that store have given it the highest ratings."

8 10. Body Source's website has earned the privilege of displaying the Yahoo! Top
9 Service icon.

10 11. Indeed, the SuppleNet.com website features an extensive sampling of
11 appreciative testimonials from customers.

12 12. In addition to supplements, Body Source's website also offers discount prices on
13 a wide selection of premium tanning products (the "Tanning Products").

14 13. All the Tanning Products sold by Body Source at the SuppleNet.com website are
15 purchased by Body Source at retail tanning salons.

16 14. To ensure control over their distribution network, many manufacturers of the
17 Tanning Products enter into agreements with their wholesale distributors which forbid those
18 distributors from selling the Tanning Products to retailers other than tanning salons, such as
19 retail and wholesale stores, pharmacies, beauty supply stores, flea markets and the Internet
20 ("Distribution Control Policies").

21 15. Leading manufacturers of the Tanning Products state publicly that their purpose
22 in maintaining tight control over the channels of distribution is to ensure proper consumer
23 guidance from the "highly qualified professionals" who work at tanning salons.

24 16. In fact, the "training" required properly to apply and otherwise utilize the
25 Tanning Products does not require particular expertise, and most regular users of these products
26 are able to obtain the knowledge necessary to use them properly with a minimum of self-
27 education.

28 17. The real reason for maintenance of a Distribution Control Policy is not

1 consumer protection, but commercial and business strategy.

2 18. Defendant maintains a Distribution Control Policy.

3 19. Among the Tanning Products sold by Body Source on the SuppleNet.com
4 website are Tanning Products manufactured by defendant (the "CalTan Products").

5 20. All CalTan Products sold by Body Source on the SuppleNet.com website are
6 purchased by Body Source from tanning salons, and not from wholesale distributors.

7 21. On February 20, 2004, Body Source received a letter, delivered via Federal
8 Express, accusing Body Source of violating various federal and state laws, including trademark
9 infringement, unfair competition and intentional interference with contract, in connection with
10 its sale of the CalTan Products (the "February 20, 2004 Letter"). A copy of the February 20,
11 2004 Letter is attached hereto as Exhibit A.

12 22. Body Source's New York counsel responded in a letter dated March 2, 2004 (the
13 "March 2, 2004 Letter"), acknowledging the by-then discontinued utilization of certain
14 thumbnail photographs found on plaintiff / counterclaim defendant's website, but noting as to
15 plaintiff / counterclaim defendant's trademark claims that the Ninth Circuit has strongly
16 endorsed the fair use of trademarks, such as that by Body Source (which does indeed sell
17 genuine CalTan products) in visible HTML code and metatags alike. A copy of the March 2,
18 2004 Letter is attached hereto as Exhibit B.

19 23. The March 2, 2004 Letter also informed plaintiff / counterclaim defendant that
20 all CalTan Products sold by Body Source on the SuppleNet.com website are purchased by
21 Body Source from tanning salons, and not from wholesale distributors, so there were no
22 grounds for the claim of tortious interference of contract.

23 24. In response, plaintiff / counterclaim defendant replied by a letter dated March
24 13, 2004 (the "March 13, 2004 Letter"), which did not deny that defendant was making its
25 purchases from retailers nor suggest that plaintiff / counterclaim defendant had any reason to
26 believe that all the Tanning Products sold by Body Source at the SuppleNet.com website are
27 not purchased by the Body Source plaintiff / counterclaim defendant at retail tanning salons.

28 25. The March 13, 2003 Letter from plaintiff / counterclaim defendants claimed,

1 however, as follows: “By acting in concert with ‘retailers’ to cause Cal Tan’s distributors to
2 violate their distributor agreements, Supplenet is interfering with Cal Tan’s distributor
3 agreements and is liable for damages.” A copy of the March 13, 2004 Letter is attached hereto
4 as Exhibit C.

5 26. The March 13, 2004 Letter did not explain the meaning of the phrase “entities
6 such as ‘retailers’” as distinguished from retail tanning salons or what sort of “entities” plaintiff
7 / counterclaim defendant meant.

8 27. All the Tanning Products sold by Body Source at the SuppleNet.com website are
9 purchased by Body Source at retail tanning salons.

10 28. The March 13, 2003 Letter from plaintiff / counterclaim defendants did not
11 suggest any authority for the novel proposition that lawful purchases by Body Source from
12 retail tanning salons could amount to an interference with the contract between CalTan and its
13 wholesale distributors.

14 29. Body Source’s counsel responded on March 19th, noting that Body Source did
15 not even have first-hand knowledge of the existence of the alleged contracts between CalTan
16 and its wholesale distributors, never having been shown a copy even of a form of such a
17 contract.

18 30. Body Source never provided proof of such an agreement.

19 **FIRST CAUSE OF ACTION**

20 ***Declaratory Judgment of Non-Infringement***

21 ***(28 U.S.C. §2201)***

22 31. Body Source incorporates by reference the allegations contained in the
23 foregoing paragraphs.

24 32. Body Source’s use of the various product names and the brand name of the
25 CalTan Products is fair use and does not infringe any federal or state trademark.

26 33. By accusing Body Source of federal and state trademark infringement, plaintiff /
27 counterclaim defendant has created a present and actual controversy between the parties.

28 34. Body Source’s remedy at law, in the event plaintiff / counterclaim defendant

1 seeks or obtains a preliminary injunction, is not adequate to compensate it for the injuries
2 threatened or inflicted by plaintiff / counterclaim defendant.

3 35. Body Source requests that this Court declare and adjudicate the parties'
4 respective rights and duties with respect to Body Source's fair use of the trademarks owned,
5 associated with or allegedly owned by plaintiff / counterclaim defendant.

6 **SECOND CAUSE OF ACTION**

7 ***Declaratory Judgment of Non-Interference with Contract***

8 ***(28 U.S.C. §2201)***

9 36. Body Source incorporates by reference the allegations contained in the
10 foregoing paragraphs.

11 37. Body Source purchases its whole stock of CalTan Products from retail tanning
12 salons.

13 38. Upon information and belief, such tanning salons are authorized resellers of the
14 CalTan Products pursuant to plaintiff / counterclaim defendant's own Distribution Control
15 Policy. By accusing Body Source of intentional interference with contract, plaintiff /
16 counterclaim defendant has created a present and actual controversy between the parties.

17 39. Plaintiff / counterclaim defendant's actions have caused Body Source to bring
18 this action which is the only means for it to maintain its lawful sale of the CalTan Products.

19 40. Body Source's remedy at law, in the event plaintiff / counterclaim defendant
20 seeks or obtains a preliminary injunction, is not adequate to compensate it for the injuries
21 threatened or inflicted by plaintiff / counterclaim defendant.

22 41. Body Source requests that this Court declare and adjudicate the parties'
23 respective rights and duties with respect to Body Source's source of CalTan Products.

24 **THIRD CAUSE OF ACTION**

25 ***State Law Unfair Competition***

26 ***(California Business & Professions Code § 17200)***

27 42. Body Source incorporates by reference the allegations contained in the
28 foregoing paragraphs.

EXHIBIT A



CALIFORNIA TAN, INC.

February 20, 2004

VIA FEDERAL EXPRESS

Mr. Larry Sagarin
Body Source, Ltd.
308 East Montauk Highway
Lindenhurst, NY 11757

15 E. Deer Park Rd., Ste. 4
Dix Hills, New York 11746

Re: Misappropriation of California Tan, Inc.'s Intellectual Property on thesupplenet.com

Dear Mr. Sagarin:

This letter will follow up the phone conversation I had with a thesupplenet.com representative concerning the misuse of California Tan, Inc.'s ("Cal Tan") intellectual property on your website and interference with Cal Tan's distributor contracts. During this conversation your representative informed me that your company was not violating Cal Tan rights because you posted a "tanning lotion disclaimer" on the site. In our view this disclaimer is meaningless and irrelevant to the fact that you willfully infringe Cal Tan federally protected copyright and trademark material. Thus, I have been directed to take whatever legal action may be necessary to assure your compliance with Cal Tan's rights. Enclosed with this letter is a conformed copy of a complaint filed this week in Los Angeles, California by Cal Tan against you and your company.

The following are highlights of a few of the infringements alleged against you, details on Cal Tan's distribution network, and information regarding litigation between Cal Tan and other websites similar to thesupplenet.com:

Cal Tan owns several registered trademarks including California Tan[®], Matahari[®], Emerald Bay[®], and Zoe Girl[™]. These trademarks have been used by Cal Tan for many years and have developed significant recognition among consumers. Indeed, consumers looking for indoor tanning products look specifically for these brands. Accordingly, by utilizing these trademarks on internet sites and/or paying referral fees to internet search engines to identify your internet sites when a user runs a search including these trademarks potential consumers are misdirected from Cal Tan's own internet site to your internet site. Cal Tan's internet site refers consumers to authorized dealers where the consumers can receive proper instruction and information concerning its products.

In an effort to protect consumers, Cal Tan established a distribution network which limits sales to tanning salons. Accordingly, Cal Tan only sells its products to authorized distributors who have agreed in writing not to resell the products to self-service environments (such as the Internet, retail and wholesale stores, beauty supply stores, cosmetic stores, drugstores, and flea markets) wherein the consumer is not

offered specific guidance and information on the products. With the help of its authorized distributors, Cal Tan sponsors symposiums throughout the United States to teach specialized training and usage instruction to tanning salon staff. Additionally, tanning salons that sell Cal Tan's products are provided with educational materials concerning the proper usage and dosage of the products.

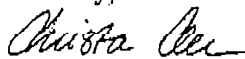
I also wish to inform you of Cal Tan's recent litigation resulting in injunctions against websites selling our tanning lotions. The same legal actions will be pursued against your company if you do not cease the sale of Cal Tan products on your website immediately.

Cal Tan has obtained permanent injunctions against numerous major website operators who were selling Cal Tan's products over the internet. You will recognize these websites which include: LOTIONBARN.COM, LEWIESTANNING.COM, ABETTERTAN.COM, BUYTANNINGLOTIONS.COM, 2TAN.COM, DISCOUNTTANNINGLOTION.COM, INTERNETMARKETINGGUYS.COM, and TANNING-BEDS-LOTIONS-PRODUCTS.COM. Cal Tan has invested, and will continue to invest, in protecting its intellectual property rights from misuse on the internet and preventing interference with its distribution agreements.

Cal Tan's fight against the unauthorized sale and advertisement of our products is far from over. Cal Tan is currently filing several new suits for violation of state and federal trademark and copyright infringement laws and state and federal unfair competition statutes. These suits follow careful investigations into the unauthorized advertising and sale of our products and the unauthorized use of our copyright and trademark protected materials. Internet Retailers, Beauty Supply Stores, Flea Markets, and other non-tanning salon environments are not authorized to resell Cal Tan products or utilize our intellectual property. Accordingly, your business was included in one of our investigations and we have concluded you violate numerous Cal Tan rights.

Please be on notice that you and your website, thesupplenet.com, are participating in the unauthorized sale and advertising of Cal Tan, Matahari, Zoe Girl, and/or Emerald Bay products. Cal Tan, desirous of an amicable settlement of this lawsuit, is willing to discuss such settlement prior to serving this complaint on you and commencing litigation in Federal District Court in Los Angeles, California. Please contact me no later than February 27, 2004 if you wish to discuss settlement prior to service of the complaint.

Sincerely,



Christa Cole
General Counsel
California Tan, Inc.

Phone: 310-824-2508 ext. 211
Fax: 310-824-0368
Email: ccole@caltan.com

EXHIBIT B

COLEMAN LAW FIRM
A PROFESSIONAL CORPORATION

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WWW.COLEMAN-FIRM.COM

March 2, 2004

BY FACSIMILE

Christa Cole
General Counsel
California Tan, Inc.
10877 Wilshire Boulevard - 12th Floor
Los Angeles, CA 90024

Re: TheSuppleNet.com

Dear Christa:

We have had a chance to familiarize ourselves with California Tan's claims and the factual situation relating to www.TheSuppleNet.com. Under the circumstances, we do not see any basis for advising our client to change its present practices.

It appears that our client may have used thumbnail photographs of the Cal Tan products it sells which were available on the Internet, and which originated with your company. Those have been removed. If you would like to discuss the appropriate measure of damages for this misuse, that would seem appropriate under the circumstances.

There is no trademark infringement for fair use of a trademark, which is what our client is doing here. It sells Cal Tan products and it accurately states that it does so. The Ninth Circuit is quite famously on the record of acknowledging the propriety of such use, whether in visible HTML code or metatags. Similarly, as you know the search engine / infringement issue is quite "hot" right now, including in your Circuit, but even then this case is unquestionably a fair use of the trademark. There is no "diversion" or the like because the genuine product is being sold.

Christa Cole, Esq.
March 2, 2004
Page 2 of 2

Finally, there is no issue of tortious interference with contract because our client purchases the Cal Tan products it sells from retail establishments, not from a distributor.

Considering all the foregoing, our client is prepared to litigate vigorously to defend its right to sell a legal product, purchased legally, to legal purchasers. Your client's stated preference that only highly-trained tanning professionals sell the stuff is no more than that – a preference, and not one that is binding on the rest of the world.

In light of your acknowledgment to me on the phone last week that you had been speaking to the ETS people about our client's activities, as well as our client's receipt of a letter from another tanning product manufacturer over the weekend, we are hard pressed to see this lawsuit as anything other than part of a campaign – possibly orchestrated among many industry players – to restrain trade and compete unfairly. We will certainly include appropriate allegations of the same in any counterclaims filed through our California counsel if Cal Tan proceeds with this litigation. Frankly it appears that the better course would be for Cal Tan to leave our client alone and focus on delivering value to its customers, as TheSuppleNet.com has succeeded in doing.

Certainly, Christa, if you have any factual information which suggests that any of the foregoing is incorrect, please let me know immediately – it may well affect how we advise our client. But at this juncture, our client has no concessions to offer besides those relating to the thumbnails, nor are we in a position to urge it to do otherwise.

Thank you for your courtesies thus far.

Very truly yours,



Ronald D. Coleman

EXHIBIT C



CALIFORNIA TAN, INC.

SENT VIA FACSIMILE & U.S. MAIL

March 13, 2004

Mr. Ronald D. Coleman
Coleman Law Firm
The Diamond Building
881 Allwood Road
Clifton, New Jersey 07012

RE: California Tan, Inc. v. Body Source, Ltd.
U.S. Dist. Court Case No. CV 04-1052 DT (FMOx)

Dear Mr. Coleman:

This letter responds to the relevant points raised in your letter dated March 2, 2004. To the extent we do not specifically address any statement in your letter, you should assume that California Tan, Inc. ("Cal Tan") denies your assertions.

As outlined in our complaint, Body Source, Ltd./thesupplenet.com's ("Supplenet") unauthorized use of Cal Tan's copyright and trademarks resulted in trademark infringement, copyright infringement, dilution, unfair competition, and unauthorized infringement of a trademark to enhance the commercial value of Supplenet's product. Your letter even admits the copyright infringement concerning the use of Cal Tan's photographs. However, the infringement goes much farther than your letter admits.

Supplenet's infringement is willful. Supplenet continues to use the text from Cal Tan's copyrighted materials, even after our demand letter, merely transposing a few words or phrases. It continues to use Cal Tan's trademarks to misdirect customers searching the internet from Cal Tan's website to Supplenet. In addition to the diversion of customers searching for Cal Tan's websites, the combined use of Cal Tan's copyrighted materials and trademarks creates the impression that Cal Tan sponsors or endorses Supplenet's website. These facts, as well as others, establish Supplenet's intentional infringement and unfair business practices.

In addition, Supplenet has been on notice that Cal Tan's distributors are not authorized to distribute Cal Tan's products for resale on the internet or in any other manner inconsistent with the distributor's agreement with Cal Tan. By acting in concert with entities such as "retailers" to cause Cal Tan's distributors to violate their distributor agreements, Supplenet is interfering with Cal Tan's distributor agreements and is liable for damages.

Finally, your reference to a "campaign - orchestrated among many industry players - to restrain trade and compete unfairly" is patently without merit. Indeed, you would personally be subject to sanctions under Federal Rule of Civil Procedure 11 for asserting a frivolous claim and you would also be personally liable to Cal Tan for malicious prosecution and abuse of process for even asserting such a claim. Simply put, you have no basis for such a claim, because there is none.

I will reiterate Cal Tan's demands as stated in my previous letter. We demand that your client immediately cease the distribution and sale of any and all California Tan, Inc. products. We further demand that your client: (1) account for all sales of Cal Tan products for at least the last three years; (2) inform us of the types and quantities of product that remain in inventory, and (3) identify where the products were obtained. If your client does not comply by March 22, 2004, I will direct that your client be formally served with the complaint and await his answer.

This letter is not a full statement of the factual or legal bases for Cal Tan's claims. Cal Tan reserves, and does not waive or limit, any rights, remedies or claims, whether in law or in equity, that it may have against your client. If you have any questions regarding the foregoing, please contact me at the number below.

Sincerely,



Christa Cole
General Counsel
California Tan, Inc.

Phone: 310-824-2508 ext. 211
Fax: 310-824-0368
Email: ccole@caltan.com