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Attorneys for Defendants / Counterclaim Plaintiff S & L
Vitamins, Inc. and Defendant Larry Sagarin

**UNITED STATES DISTRICT COURT
DISTRICT OF ARIZONA**

<p>DESIGNER SKIN, LLC, an Arizona limited liability company; SPLASH TANNING PRODUCTS, LLC, an Arizona limited liability company; BOUTIQUE TANNING PRODUCTS, LLC, an Arizona limited liability company,</p> <p>Plaintiffs,</p> <p>- vs. -</p> <p>S & L VITAMINS, INC. d/b/a BODY SOURCE d/b/a THESUPPLENET.COM, a New York corporation; and LARRY SAGARIN, an unmarried individual,</p> <p>Defendants.</p> <p>-----</p> <p>S & L VITAMINS, INC. d/b/a BODY SOURCE d/b/a THESUPPLENET.COM, a New York corporation,</p> <p>Counterclaim Plaintiffs,</p> <p>- vs. -</p> <p>DESIGNER SKIN, LLC, an Arizona limited liability company; SPLASH TANNING PRODUCTS, LLC, an Arizona limited liability company; BOUTIQUE TANNING PRODUCTS, LLC, an Arizona limited liability company,</p> <p>Counterclaim Defendants.</p>	<p>CASE NO.</p> <p>CV05-3699-PHX-JAT</p> <p>ANSWER, COUNTERCLAIMS AND JURY DEMAND</p>
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Defendants, S & L Vitamins, Inc. and Larry Sagarin, by and through their undersigned attorneys, for their complaint against defendants Designer Skin, LLC, Splash Tanning Products, LLC, and Boutique Tanning Products, LLC, answer and say as follows:

1. Defendants deny knowledge and information to admit or allegation the allegations in this paragraph of the Complaint.

2. Admitted.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

7. Admitted.

8. Denied.

9. Admitted.

10. Denied.

11. Defendants deny knowledge and information to admit or allegation the allegations in this paragraph of the Complaint.

12. Defendants deny knowledge and information to admit or allegation the allegations in this paragraph of the Complaint.

13. Denied.

14. Denied.

15. Denied.

16. Denied.

17. Denied.

18. Denied.

19. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

20. Denied.

21. Denied.

22. Denied.

23. Denied.

24. Denied.

25. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

26. Denied.

27. Denied.

28. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

29. Denied.

30. Denied.

31. Denied.

32. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

33. Defendants deny knowledge and information to admit or allegation the allegations in this paragraph of the Complaint.

34. Denied.

35. Denied.

36. Denied.

37. Denied.

38. Denied.

39. Denied.

40. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

41. Denied.

42. Denied.

43. Denied.

44. Denied.

45. Denied.

46. Denied.

47. Denied.

48. Denied.

46. Denied.

49. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

50. Denied.

51. Denied.

52. Defendants incorporate the respective allegations of the Complaint realleged therein in this paragraph by reference.

53. Denied.

54. Denied.

. WHEREFORE, defendants demand that the Complaint be dismissed, with prejudice, in its entirety, and that plaintiff be granted its attorneys fees and costs of suit.

AFFIRMATIVE DEFENSES

PENDING ACTION

An action was filed in the United States District Court for the Eastern District of New York by defendant S & L Vitamins, Inc., prior in time to the filing of this one, and counterclaims were filed therein regarding the same actions and transactions as those alleged by the pleadings, including the counterclaims, herein, and all discovery has been completed in the aforesaid prior-filed action.

FAILURE TO STATE A CLAIM

Defendant has failed to state a claim for which relief can be granted.

UNCLEAN HANDS

Defendant's claims are barred by the doctrine of unclean hands.

FAIR USE

Any use by plaintiffs of trademarks owned by defendant was fair use and not trademark use.

COUNTERCLAIMS

THE PARTIES

1. Counterclaim plaintiff S & L Vitamins, Inc., ("S & L"), is a New York corporation with a principal place of business at 308 East Montauk Highway, Lindenhurst, New York.
2. S & L does business as "Body Source."
3. Counterclaim defendant Designer Skin, LLC, is an Arizona company with a principal place of business at 1801 West 4th Street, Tempe, Arizona.
4. Counterclaim defendant Splash Tanning Products, LLC, is an Arizona company with a principal place of business at 1325 West 21st Street, Tempe, Arizona.

5. Counterclaim defendant Boutique Tanning Products, LLC, is an Arizona company with a principal place of business at 1325 West 21st Street, Tempe, Arizona.

JURISDICTION AND VENUE

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

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

8. Personal jurisdiction over defendants is vested in this Court because of plaintiff's place of business in this District.

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

FACTS

10. S & L operates an Internet website which provides consumers with the opportunity to purchase, at discount prices, various products including nutritional and performance-enhancing supplements, located at www.TheSuppleNet.com ("SuppleNet.com")

11. S & L's website operates on a technological and electronic commerce platform contracted from Yahoo! Small Business Merchant Solutions, a service of Yahoo!, Inc. ("Yahoo!").

12. Yahoo! is the No. 1 Internet brand globally and attracts the largest audience worldwide, over 237 million unique users per month. Yahoo! has become the Internet's leading

global business services company, offering a comprehensive network of essential services for businesses of all sizes. Yahoo!'s corporate mission is to represent Internet best-practices and expertise.

13. S & L's website has earned the privilege of displaying the Yahoo! Top Service icon.

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

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

16. In addition to supplements, S & L's website also offers discount prices on a wide selection of premium tanning products (the "Tanning Products").

17. All the Tanning Products sold by plaintiff at the SuppleNet.com website are purchased by the plaintiff at retail tanning salons.

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

19. Certain manufacturers of the Tanning Products state publicly that their purpose in maintaining tight control over the channels of distribution is to ensure proper consumer guidance from the highly qualified professionals employed at tanning salons.

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

21. The real reason for maintenance of an Exclusive Distribution Policy is not consumer protection, but commercial and business strategy.

22. Upon information and belief, counterclaim defendants maintain an Exclusive Distribution Policy.

23. 23. Among the Tanning Products sold by plaintiff on the SuppleNet.com website are Tanning Products manufactured by defendants (collectively referred to as the "Designer Skin products").

24. All Designer Skin products sold by S & L on the SuppleNet.com website are purchased by plaintiff from tanning salons, and not from wholesale distributors.

25. On February 26, 2004, S & L's principals received a letter from counsel for defendant Designer Skin, LLC, delivered via electronic and U.S. mail (the "February 26, 2004, Letter").

26. The February 26, 2004, Letter accused S & L of, inter alia, trademark infringement and intentional interference with Designer Skin's contracts with its distributors in connection with plaintiff's sale of Designer Skin products and making various demands that plaintiff (a) remove all references to Designer Skin from its website, (b) cease and desist from selling Designer Skin products under threat of litigation.

27. Three days later, S & L responded substantively, through counsel, in a letter dated February 29, 2004, explaining that all of S & L's purchases of Designer Skin products were made from retailers, not distributors, and rebutting the claim of trademark infringement.

28. There was no further correspondence between the parties for over a year and a half, until S & L's counsel received a letter dated October 25, 2005, from counterclaim defendants' counsel which, in addition to Designer Skin, LLC, also represented itself to be counsel for Splash Tanning Products, LLC, and Boutique Tanning Products, LLC.

29. The October 31, 2005, Letter stated that defendants are "aware of [S & L's] recent litigation with California Tan, Inc. [another tanning product company], . . . as well as the fact that [S

& L's] has committed the same violations against [S & L's]" and demanded that S & L remove counterclaim defendants' products from S & L's website "and otherwise cease and desist [S & L's] violative conduct within ten (10) calendar days of [October 25, 2005]." The letter concluded by reiterating threats of litigation unless S & L complied with these demands.

30. Fearing that the counterclaim defendants would seek to cripple competition from plaintiff by tying it up in litigation or regularly threatening to do so, S & L's filed suit seeking a declaratory judgment in the U.S. District Court for the Eastern District of New York on November 1, 2005, seeking declaratory relief as well as damages for unfair competition against defendants who have attempted to use litigation - or the threat of it - as a form of unfair competition against a smaller competitor with far fewer resources.

31. On November 4, 2005, S & L's counsel forwarded to defendants' counsel via Federal Express a copy of the Complaint as well as a Waiver of Service of Summons pursuant to Fed. R. Civ. P. 4. Neither S & L nor its counsel heard back from defendants' counsel.

32. S & L received no response to its request for a Rule 4 waiver of service until some time in mid-November when S & L received a copy of S & L was served in New York State with defendants' duplicate action which was filed in the District of Arizona on November 14, 2005.

33. There are now two identical lawsuits that are pending in this matter, a declaratory judgment action which was filed first by S & L in the Eastern District and an infringement action, involving the same parties and the same issues, which was subsequently filed by defendants in the District of Arizona.

34. All discovery has been completed in the Eastern District of New York.

FIRST CAUSE OF ACTION
Declaratory Judgment of Non-Infringement
(28 U.S.C. §2201)

35. S & L incorporates by reference the allegations contained in the foregoing paragraphs.

36. S & L's use of the various product names and the brand name of Designer Skin products is fair use and does not infringe any federal or state trademark.

37. By accusing S & L of federal and state trademark infringement and filing the complaint herein, counterclaim defendants have created a present and actual controversy between the parties.

38. Counterclaim defendants' actions have caused S & L to bring this action which is the only means for it to maintain its lawful sale of Designer Skin products.

39. S & L's remedy at law, in the event defendants seek or obtain a preliminary injunction, is not adequate to compensate it for the injuries threatened or inflicted by defendants.

40. S & L requests that this Court declare and adjudicate the parties' respective rights and duties with respect to S & L's fair use of the trademarks owned, associated with, or allegedly owned by defendants.

SECOND CAUSE OF ACTION
Declaratory Judgment of Non-Interference with Contract
(28 U.S.C. §2201)

41. S & L incorporates by reference the allegations contained in the foregoing paragraphs.

42. S & L purchases its whole stock of Designer Skin products from retail tanning salons.

43. Upon information and belief, such tanning salons are authorized resellers of the Designer Skin products pursuant to counterclaim defendants' own Exclusive Distribution Policy. By

accusing S & L of intentional interference with contract, counterclaim defendants have created a present and actual controversy between the parties.

44. Counterclaim defendants' actions have caused S & L to bring this action which is the only means for it to maintain its lawful sale of the Designer Skin products.

45. S & L's remedy at law, in the event counterclaim defendants seek or obtain a preliminary injunction, is not adequate to compensate it for the injuries threatened or inflicted by counterclaim defendants.

46. S & L requests that this Court declare and adjudicate the parties' respective rights and duties with respect to S & L's source of Designer Skin products.

THIRD CAUSE OF ACTION Unfair Competition

47. S & L incorporates by reference the allegations contained in the foregoing paragraphs.

48. On information and belief, the purpose of counterclaim defendants' cease and desist letters and the filing of the Complaint herein is to control their Exclusive Distribution Policy and not to enforce their trademarks, prevent the purported interference with contract they alleged without any basis, or to enforce any of the other supposed rights set forth in their letters.

49. Counterclaim defendants know or should know that their claims of trademark infringement are without merit.

50. Counterclaim defendants' claims of trademark infringement are false, are known by counterclaim defendants to be false, and were brought only to deprive S & L of the benefits of the fair use of the terms by which it sells consumers the Designer Skin products over the Internet.

51. Counterclaim defendants have invoked spurious claims under trademark law and other claims in an attempt to obtain a business advantage beyond the rights afforded counterclaim defendants under the Lanham Act or other such applicable laws.

52. Counterclaim defendants' actions constitute unfair business practices under applicable state and federal law.

53. Counterclaim defendants' actions are unlawful, unfair, wrongful, malicious, and fraudulent, in that they constitute misuse of federal and state trademark law, the making of frivolous trademark infringement claims, tortious interference with prospective economic advantage, trademark misuse, malicious prosecution, misrepresentation, and other forms of unfair competition, all in order to secure a business asset belonging to S & L.

54. S & L has suffered and will continue to suffer economic harm from counterclaim defendants' actions.

PRAYER FOR RELIEF

WHEREFORE, counterclaim plaintiff S & L Vitamins, Inc. prays for judgment against counterclaim defendants Designer Skin, LLC, Splash Tanning Products, LLC, and Boutique Tanning Products, LLC, as follows:

1. For a declaration that S & L's use of the various trademarks and alleged trademarks associated with the Designer Skin products is fair use and does not infringe any trademark or other right held by counterclaim defendants.
2. For a declaration that S & L's sale of the Designer Skin products is not an actual or prospective tortious interference with contract.
3. That counterclaim defendants, their officers, directors, servants, employees, attorneys, agents, representatives, distributors, and all persons in active concert or participation with them, be enjoined and restrained permanently from interfering with S & L's use of the various trademarks and alleged trademarks associated with the Designer Skin products.
4. For damages to be proven at trial;

5. For punitive damages;
6. That counterclaim defendants take nothing from S & L;
7. For reasonable attorneys' fees and costs; and
8. Such other relief as the Court deems appropriate.

Respectfully submitted,

By: _____/s/_____
Ronald D. Coleman (RC 3875)

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S & L Vitamins, Inc. and Defendant Larry Sagarin

Dated: April 5, 2007

JURY DEMAND

S & L hereby demands a jury trial on all the issues raised in this action so triable.

By: _____/s/_____
Ronald D. Coleman (RC 3875)

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Dated: April 5, 2007