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4 New York, NY 10017  
5 212-338-0700  
6 Attorneys for Defendants

7 **UNITED STATES DISTRICT COURT**  
8 **DISTRICT OF ARIZONA**

9 Designer Skin, LLC, an Arizona limited  
10 liability company; Splash Tanning Products,  
11 LLC, an Arizona limited liability company;  
12 Boutique Tanning Products, LLC, an Arizona  
13 limited liability company,

14 Plaintiffs,

15 vs.

16 S&L Vitamins, Inc. d/b/a Body Source d/b/a  
17 thesupplenet.com, a New York corporation;  
18 and Larry Sagarin, an unmarried individual,

19 Defendants.

20 S&L Vitamins, Inc. d/b/a Body Source d/b/a  
21 thesupplenet.com, a New York corporation,

22 Counterclaim Plaintiff,

23 vs.

24 Designer Skin, LLC, an Arizona limited  
25 liability company; Splash Tanning Products,  
26 LLC, an Arizona limited liability company;  
Boutique Tanning Products, LLC, an Arizona  
limited liability company,

Counterclaim Defendants.

Case No.: CV05-3699-PHX-JAT

**MOTION FOR COSTS PURSUANT TO  
FED. R. CIV. P. 68 OF DEFENDANT /  
S&L VITAMINS, INC.**

Defendant S&L Vitamins, Inc. d/b/a Body Source d/b/a thesupplenet.com, a New York corporation (“S&L”) respectfully moves this Court for an award of costs pursuant to Fed. R. Civ. P. 68.

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. Introduction**

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2  
3 The Court needs no recapitulation of the facts and legal determinations in this action, which  
4 are set forth in the detailed series of orders in this matter, most recently the Court's Findings of Facts  
5 and Conclusions of Law dated September 5, 2008 (document no. 123). Ultimately, the Court  
6 ordered judgment for plaintiffs (collectively "Designer Skin") against S&L for copyright  
7 infringement "of Designer Skin's copyrights in the electronic renderings of the Products," but  
8 awarded neither damages nor attorneys' fees to plaintiffs on their claims for copyright infringement  
9 and entered a minimal injunction prohibiting S&L "from publicly displaying, using, copying, or  
10 otherwise infringing Designer Skin's copyrights in these electronic renderings for any purpose  
11 whatsoever" (document no. 124). The Court explicitly ordered that each side would bear its own  
12 costs, though, of course, the application of Fed. R. Civ. P. 68 was not before the Court.

13 S&L now moves this Court for an order awarding its costs, including attorneys' fees,  
14 pursuant to Fed. R. Civ. P. 68, which provides that "(d) If the judgment that the offeree finally  
15 obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after  
16 the offer was made." This motion is based on an offer of judgment initially transmitted by S&L on  
17 June 13, 2008 and reiterated upon its rejection on June 20, 2008, which would have given plaintiffs a  
18 "more favorable" judgment than the one obtained – and at immensely less cost to the parties and the  
19 public.  
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21 The offer of judgment made by letter, and transmitted by email, on June 13<sup>th</sup> read as follows  
22 (see Exhibit A hereto):

23 Elan S. Mizrahi, Esq.  
24 Jennigs, Haug & Cunningham  
25 2800 North Central Avenue – Suite 1800  
26 Phoenix, AZ 85004

**Re: Designer Skin, LLC v. S&L Vitamins**

1           **05-CV-3699 (PHX) (JAT)**

2           Dear Elan:

3           The purpose of this letter is to extend to an offer of judgment under Fed. R. Civ. P.  
4           68 in the referenced litigation. Pursuant to Rule 68, defendant and counterclaim  
5           plaintiff Larry Sagarin and defendant S&L Vitamins (“S&L”) offer to have judgment  
6           taken against them, in favor of plaintiffs / counterclaim defendants Designer Skin,  
7           LLC; Splash Tanning Products, LLC; Boutique Tanning Products, LLC (collectively  
8           “Designer Skin”) in the amount of \$4,500.00 in full satisfaction of all claims herein.  
9           In addition to the amount listed above, S&L offers to include in the judgment an  
10          additional amount of \$500 as costs and attorneys’ fees. In addition, S&L offers to  
11          enter into a stipulated injunction, subject to the Court’s approval and ongoing  
12          jurisdiction for enforcement, by which S&L would be bound not to utilize any  
13          copyrighted photographs of Designer Skin for any purpose.

14          Designer Skin may indicate its acceptance of the above by execution and return of  
15          the attached form.

16          Very truly yours,  
17          [etc.]

18          In short, the offer above was for (a) S&L to take a judgment against it; (b) S&L to pay  
19          \$4,500 in as compensation; (c) S&L to pay \$500 in costs and attorneys’ fees; and (d) S&L to agree  
20          to be subject to an injunction “not to utilize any copyrighted photographs of Designer Skin for any  
21          purpose.” Obviously this offer would have been far more favorable than the relief actually obtained  
22          by Designer Skin: (a) is identical (and axiomatic); (b) is \$4,500 more than was awarded to Designer  
23          Skin as damages; (c) is \$500 more than was awarded to Designer Skin as costs and fees; and (d) is  
24          an injunction virtually identical to, if not arguably broader than, the one actually awarded by the  
25          Court.

26          On June 20, 2008, Designer Skin responded as follows by email (content represented by  
27          ellipses is unrelated to the issue of the offer of judgment) (Exhibit B):

28           **From:** Elan Mizrahi [mailto:ESM@jhc-law.com]  
29           **Sent:** Friday, June 20, 2008 12:08 PM  
30           **To:** Ronald Coleman; Tracy Kido  
31           **Cc:** Larry Crown; Heather Halpert  
32           **Subject:** RE: Designer Skin, LLC, et al. v. S & L Vitamins, Inc., et al.

33           [...] Will you withdraw your OJ in light of the mediation? I have authority to continue the  
34           trial and have prepared a draft motion.

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The undersigned responded, on behalf of S&L, as follows (Exhibit C):

**From:** Ronald Coleman [mailto:rcoleman@hpf-law.com]  
**Sent:** Friday, June 20, 2008 9:14 AM  
**To:** Elan Mizrahi; Tracy Kido  
**Cc:** Larry Crown; Heather Halpert  
**Subject:** RE: Designer Skin, LLC, et al. v. S & L Vitamins, Inc., et al.  
[...]

No, the offer of judgment is not withdrawn, though we may change the terms after the mediation.

RDC

The parties proceeded to trial on July 15<sup>th</sup>.

**II. Analysis**

**A. Application of Fed. R. Civ. P. 68**

The entire text of Fed. R. Civ. P. 68 is as follows:

**Rule 68. Offer of Judgment**

**(a) Making an Offer; Judgment on an Accepted Offer.**

More than 10 days before the trial begins, a party defending against a claim may serve on an opposing party an offer to allow judgment on specified terms, with the costs then accrued. If, within 10 days after being served, the opposing party serves written notice accepting the offer, either party may then file the offer and notice of acceptance, plus proof of service. The clerk must then enter judgment.

**(b) Unaccepted Offer.**

An unaccepted offer is considered withdrawn, but it does not preclude a later offer. Evidence of an unaccepted offer is not admissible except in a proceeding to determine costs.

**(c) Offer After Liability Is Determined.**

When one party's liability to another has been determined but the extent of liability remains to be determined by further proceedings, the party held liable may make an offer of judgment. It must be served within a reasonable time — but at least 10 days — before a hearing to determine the extent of liability.

**(d) Paying Costs After an Unaccepted Offer.**

If the judgment that the offeree finally obtains is not more favorable than the unaccepted offer, the offeree must pay the costs incurred after the offer was made.

Clearly this Rule applies here. The offer was transmitted (by email, the manner in which

1 counsel in this matter had for almost the entire litigation served process on each other) more than ten  
2 days prior to trial. It was “not accepted” by means of an affirmative refusal on June 20<sup>th</sup>, but was  
3 reiterated on June 20<sup>th</sup>, also more than ten days prior to trial. And, as demonstrated above, the  
4 judgment obtained by Designer Skin was obviously “not more favorable” than the one it could have  
5 obtained by accepting the Offer of Judgment.

6 “Under Rule 68, if a plaintiff rejects a defendant's offer of judgment, and the judgment  
7 finally obtained by plaintiff is not more favorable than the offer, the plaintiff must pay the costs  
8 incurred subsequent to the offer. The award is mandatory; Rule 68 leaves no room for the court's  
9 discretion.” *United States v. Trident Seafoods Corp.*, 92 F.3d 855, 859 (9th Cir. 1996) (citations and  
10 internal quotes omitted). Here S&L would be entitled to its costs under this Rule even if, *arguendo*,  
11 Designer Skin could demonstrate that the offer of judgment were identical to the ultimate relief  
12 obtained. See, *Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 442 (9<sup>th</sup> Cir. 1982). Here where the  
13 offer was clearly superior to the ultimate result, Rule 68 certainly applies and Designer Skin must be  
14 taxed.

### 15 **B. Bill of costs**

16 As stated above, the Court ordered in its Findings of Facts and Conclusions of law that each  
17 side would bear its own costs, based on each side’s applications for costs and fees under the  
18 Copyright Act. Fed. R. Civ. P. 68 was not before the Court, however; for that matter, this Court’s  
19 Local Rule 54.1 was not, at that time, relevant because the final order did not provide for an award  
20 of costs. Here a bill of costs would only properly be submitted upon a ruling by the Court granting  
21 this motion and setting a deadline for such a submission.

### 22 **III. Conclusion**

23 For the foregoing reasons, the Court should enter an order awarding S&L its litigation costs  
24 herein pursuant to Fed. R. Civ. P. 68, and set a deadline for the submission of a bill of costs for the  
25 Court’s consideration.  
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DATED this 15th day of September, 2008,

Respectfully submitted,

By: \_\_\_\_\_/s/\_\_\_\_\_

Ronald D. Coleman (*Pro Se*)  
**HOFFMAN POLLAND & FURMAN PLLC**  
220 E. 42<sup>nd</sup> Street, Ste. 435  
New York, New York 10017  
(212) 338-0700

# EXHIBIT A

**Ronald Coleman**

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**From:** Ronald Coleman  
**Sent:** Friday, June 13, 2008 2:33 PM  
**To:** 'Elan Mizrahi'  
**Cc:** Heather Halpert  
**Subject:** Fed. R. Civ. P. 68 Offer of Judgment  
**Attachments:** Jun 13 08 Mizrahi.pdf

Elan,

Please find the enclosed Offer of Judgment for your client's consideration.

Let's hook up by Tuesday AM with our sections for the pretrial order.

RDC



**HOFFMAN POLLAND & FURMAN, PLLC**

Attorneys At Law  
220 EAST 42<sup>ND</sup> STREET, SUITE 435  
NEW YORK, NEW YORK 10017  
(212) 338-0700  
FAX (212) 338-0093  
[www.HPF-Law.com](http://www.HPF-Law.com)

June 13, 2008

**VIA EMAIL**

Elan S. Mizrahi, Esq.  
Jennigs, Haug & Cunningham  
2800 North Central Avenue – Suite 1800  
Phoenix, AZ 85004

**Re: Designer Skin, LLC v. S&L Vitamins**  
**05-CV-3699 (PHX) (JAT)**

Dear Elan:

The purpose of this letter is to extend to an offer of judgment under Fed. R. Civ. P. 68 in the referenced litigation. Pursuant to Rule 68, defendant and counterclaim plaintiff Larry Sagarin and defendant S&L Vitamins (“S&L”) offer to have judgment taken against them, in favor of plaintiffs / counterclaim defendants Designer Skin, LLC; Splash Tanning Products, LLC; Boutique Tanning Products, LLC (collectively “Designer Skin”) in the amount of \$4,500.00 in full satisfaction of all claims herein. In addition to the amount listed above, S&L offers to include in the judgment an additional amount of \$500 as costs and attorneys’ fees. In addition, S&L offers to enter into a stipulated injunction, subject to the Court’s approval and ongoing jurisdiction for enforcement, by which S&L would be bound not to utilize any copyrighted photographs of Designer Skin for any purpose.

Designer Skin may indicate its acceptance of the above by execution and return of the attached form.

Very truly yours,



Ronald D. Coleman

**FORM FOR ACCEPTANCE OF OFFER OF JUDGMENT:**

Plaintiff / counterclaim defendants Designer Skin, LLC; Splash Tanning Products, LLC; Boutique Tanning Products, LLC accept S&L's foregoing offer of judgment in complete settlement of the referenced matter.

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ELAN MIZRAHI

Attorneys for plaintiffs / counterclaim  
defendants  
Designer Skin, LLC; Splash Tanning Products,  
LLC; Boutique Tanning Products, LLC

Dated: June \_\_, 2008

# EXHIBIT B

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**From:** Elan Mizrahi [ESM@jhc-law.com]  
**Sent:** Friday, June 20, 2008 12:08 PM  
**To:** Ronald Coleman; Tracy Kido  
**Cc:** Larry Crown; Heather Halpert  
**Subject:** RE: Designer Skin, LLC, et al. v. S & L Vitamins, Inc., et al.

I will send you an exemplar agreement, which is what I intend to use. I don't intend on submitting every executed agreement. On the voir dire, it's just a list of potential questions. Will you withdraw your OJ in light of the mediation? I have authority to continue the trial and have prepared a draft motion.

# EXHIBIT C

## Ronald Coleman

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**From:** Ronald Coleman

**Sent:** Friday, June 20, 2008 12:14 PM

**To:** 'Elan Mizrahi'; 'Tracy Kido'

**Cc:** 'Larry Crown'; Heather Halpert

**Subject:** RE: Designer Skin, LLC, et al. v. S & L Vitamins, Inc., et al.

Pease send the "exemplar" immediately.

No, the Office of the Clerk will not draw the Court's attention to the message. Case 2:05-cv-03699-JAT Document 125 Filed 09/15/2008 Page 14 of 14

RDC