

NO. \_\_\_\_\_

THE STATE OF TEXAS,

Plaintiff

v.

DARQUE TAN, LLC; SEGLER  
ENTERPRISES LTD.; ROBBIE  
SEGLER; MONICA JONES; and JASON  
JONES,

Defendants.

§  
§  
§  
§  
§  
§  
§  
§  
§  
§

IN THE DISTRICT COURT

TRAVIS COUNTY, TEXAS

\_\_\_\_ JUDICIAL DISTRICT

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

TO THE HONORABLE DISTRICT JUDGE:

COMES NOW, the STATE OF TEXAS (Plaintiff), acting by and through the Attorney General of Texas, GREG ABBOTT, and on behalf of the Texas Department of State Health Services Commissioner, DAVID L. LAKEY, M.D., complaining of DARQUE TAN, LLC; SEGLER ENTERPRISES LTD.; ROBBIE SEGLER; MONICA JONES; and JASON JONES, (Defendants). For cause of action, the State respectfully shows the following:

**I. DISCOVERY CONTROL PLAN**

1.1 The discovery in this case is intended to be conducted under Level 2 pursuant to Tex. R. Civ. P. 190.3.

**II. JURISDICTION**

2.1 This action is brought by Attorney General GREG ABBOTT, through his Consumer Protection & Public Health Division, in the name of the State of Texas and in the public interest

under the authority granted him by section 17.47 of the Texas Deceptive Trade Practices-Consumer Protection Act, TEX. BUS. & COM. CODE ANN. §§17.41 - 17.63 ("DTPA"), upon the ground that Defendants have engaged in false, deceptive and misleading acts and practices in the course of trade and commerce as defined in, and declared unlawful by, DTPA sections 17.46(a) and (b).

2.2 This action is further brought by Attorney General GREG ABBOTT on behalf of the Texas Department of State Health Services Commissioner, DAVID L. LAKEY, M.D., upon the ground that Defendants have violated the Texas Health & Safety Code and referred the case to the Office of the Attorney General. See TEX. HEALTH & SAFETY CODE §§ 145.0121, 431.047, 431.0585 (Vernon 2001).

### **III. DEFENDANTS**

3.1 Defendant **DARQUE TAN, LLC** is a Texas corporation with headquarters in Houston, Texas. Darque Tan, LLC is the General Partner of Segler Enterprises, LTD. It may be served through its **Registered Agent: Nicholas J. Lanza, 5177 Richmond, Suite 850, Houston, Texas 77056. SERVICE OF PROCESS IS HEREBY REQUESTED.**

3.2 Defendant **SEGLER ENTERPRISES, LTD.** is a Texas corporation d/b/a Darque Tan, with its headquarters in Houston, Texas. It may be served through its **Registered Agent: Nicholas J. Lanza, 5177 Richmond, Suite 850, Houston, Texas 77056. SERVICE OF PROCESS IS HEREBY REQUESTED.**

3.3 Defendant **ROBBIE SEGLER** is the Director, President, and Secretary of Darque Tan, LLC, and resides in Texas. He may be served at 5407 China Doll, Houston, Texas 77041.

**SERVICE OF PROCESS IS HEREBY REQUESTED.**

3.4 Defendant **MONICA JONES** is an individual residing in Texas and owns at least eight Darque Tan facilities in San Antonio, Texas. Monica Jones may be served at: 5002 Roundtable, San Antonio, Texas 78218. **SERVICE OF PROCESS IS HEREBY REQUESTED.**

3.5 Defendant **JASON JONES** is an individual residing in Texas and owns at least eight Darque Tan facilities in San Antonio, Texas. Jason Jones may be served at: 5002 Roundtable, San Antonio, Texas 78218. **SERVICE OF PROCESS IS HEREBY REQUESTED.**

**IV. VENUE**

4.1 Under Texas Health & Safety Code sections 145.0121(d) and 431.0585(d), venue is proper in Travis County, Texas.

**V. PUBLIC INTEREST**

5.1 Because Plaintiff State of Texas has reason to believe that Defendants have engaged in, and will continue to engage in, the unlawful practices set forth below, Plaintiff has reason to believe Defendants have caused adverse effects to legitimate business enterprises which lawfully conduct trade and commerce in this State. The Consumer Protection & Public Health Division of the Office of the Attorney General believes that these proceedings are in the public interest.

**VI. TRADE AND COMMERCE**

6.1 Defendants have, at all times described below, engaged in conduct which constitutes "trade" and "commerce" as those terms are defined by DTPA section 17.45(6).

## **VII. ACTS OF AGENTS**

7.1 Whenever in this Petition it is alleged that any Defendants did any act, it is meant that:

- A. Defendants performed or participated in the act; or
- B. Defendants' officers, agents, or employees performed or participated in the act on behalf of and under the authority of the Defendants.

## **VIII. NOTICE BEFORE SUIT**

8.1 At least seven days prior to filing suit, Defendants were notified of the unlawful conduct alleged herein.

## **IX. NATURE OF DEFENDANTS' OPERATIONS**

9.1 Defendants operate tanning facilities providing indoor tanning services to the public within the State of Texas and Nationwide. Defendants' tanning facilities are regulated under the Tanning Facility Regulation Act, TEX. HEALTH & SAFETY CODE §§ 145.001-145.016 (Vernon 2001 & Supp. 2008). See specifically TEX. HEALTH & SAFETY CODE §§ 145.002(8). Defendants' tanning devices are also regulated under the Texas Food, Drug & Cosmetic Act, TEX. HEALTH & SAFETY CODE §§ 431.001 - 431.415 (Vernon 2001 & Supp. 2008).

9.2 Defendants use ultraviolet lamps<sup>1</sup> for tanning to provide tanning services to 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

---

<sup>1</sup>By 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)).

tanning the skin, nothing more. The Federal Food & Drug Administration (“FDA”) classifies devices based on the intended use, as presented by the device manufacturer.

9.3 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.<sup>2</sup> Therefore, ultraviolet lamps for tanning are limited to the intended use of tanning the skin.

9.4 Defendants represent and advertise that the use of their tanning devices results in health or medical benefits, claiming that using their devices increases the amount of vitamin D absorbed by the users. Defendants also claim that “UVB from tanning converts cholesterol into vitamin D.”

9.5 Defendants make the health or medical claim that indoor tanning increases the user’s intake of vitamin D and that increased levels of vitamin D have been shown to reduce the incidence or risk of cancer. Defendants then make health or medical claims that using their tanning devices increases vitamin D levels, thereby reducing the user’s risk of developing cancer. Defendants’ agents have specifically made the following health or medical claims: (1) “[p]eople that have high levels of vitamin D . . . are not as likely to get cancer,” and (2) “[s]o would you be more worried about the skin cancer on your arm and being able to have it laser cut out . . . or

---

<sup>2</sup> 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.

would you rather have ovarian cancer that you can't get rid of and . . . people die from.”

Defendants also make the health or medical claim that indoor tanning reduces the risk of breast cancer. See DARQUE TAN - BREAST CANCER RESEARCH - 60 SEC (<http://www.youtube.com/watch?v=RI3ddeSZ2sA>). See Exhibit A (attached).

9.6 Defendants' tanning devices have not been approved by the FDA for either delivering doses of vitamin D or reducing risk of cancer. Defendants cannot legally make claims of delivering doses of vitamin D or reducing risk of cancer as these claims change the intended use of the devices from the FDA approved use for tanning of the skin. Consequently, Defendants cannot legally use or advertise the use of their tanning devices for any purpose other than tanning the skin.

#### **X. FALSE, MISLEADING OR DECEPTIVE ACTS**

10.1 Defendants, as alleged above and detailed below, have in the course of trade and commerce engaged in practices declared unlawful by the DTPA. Such acts include:

A. Engaging in false, misleading, or deceptive acts or practices in the conduct of any trade or commerce, in violation of DTPA section 17.46(a);

B. Representing that goods or services have sponsorship, approval, characteristics, ingredients, uses, benefits, or quantities which they do not have or that a person has a sponsorship, approval, status, affiliation, or connection which he does not have, in violation of DTPA section 17.46(b)(5); and

C. Failing to disclose information concerning goods or services which was known at the time of the transaction if 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, in violation of DTPA section 17.46(b)(24).

## **XI. TEXAS HEALTH & SAFETY CODE VIOLATIONS**

**11.1** Ultraviolet lamps for tanning are “tanning devices” pursuant to section 145.002(7) of the Texas Health & Safety Code. Tanning devices under the Tanning Facility Regulation Act are also defined as devices under section 431.002(13) of the Texas Health and Safety Code.

**11.2** Defendants’ tanning devices are also regulated under the Texas Food, Drug & Cosmetic Act, TEX. HEALTH & SAFETY CODE §§ 431.001 - 431.415 (Vernon 2001 & Supp. 2008). Under Texas Health & Safety Code section 431.002(13), a device is an instrument, apparatus, implement, machine, contrivance or other similar article, that is intended for use in the diagnosis of disease or other conditions, or in the cure, mitigation, treatment, or prevention of disease in man or intended to affect the structure or any function of the body.

**11.3** Texas Health & Safety Code section 145.007 (Vernon 2001) prohibits a tanning facility from claiming or distributing promotional materials claiming that using a tanning device will result in medical or health benefits. Defendants have violated this provision by claiming and/or distributing materials claiming that using a tanning device increases the users intake of vitamin D. Defendants have further violated this provision by stating that the use of their tanning devices will reduce the consumer’s incidence or risk of cancer.

**11.4** Texas Health & Safety Code section 431.182(a) states that an advertisement of a device is false if it is false or misleading in any particular. Defendants’ claims that its tanning devices deliver doses of vitamin D or reduce the risk of cancer 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 Texas Health & Safety Code section 431.182(a).

**11.5** Defendants' claims that their tanning devices deliver doses of vitamin D or reduce the risk of cancer violate Texas Health & Safety Code section 431.021(f) which prohibits the dissemination of any false advertisement.

**11.6** Section 431.112(e) of the Texas Health & Safety Code 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. 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 Texas Health & Safety Code.

**11.7** Defendants' false or misleading advertising of devices for unapproved uses misbrands the devices in commerce under section 431.021(b) of the Texas Health and Safety Code. In addition, Defendants' use of such misbranded devices to provide tanning of the skin result in the introduction into commerce of misbranded devices pursuant to section 431.021(a) of the Texas Health and Safety Code.

## **XII. INJURY TO CONSUMERS**

**12.1** Defendants have, by means of these unlawful acts and practices, obtained money or other property from identifiable persons to whom such money or property should be restored.

### **XIII. CONDITIONS' PRECEDENT**

13.1 All conditions precedent to Plaintiff's right to recover and Defendants' liability have occurred or have been waived.

### **XIV. JURY TRIAL**

14.1 Plaintiff herein requests a trial by jury.

### **XV. APPLICATION FOR PERMANENT INJUNCTION**

15.1 Plaintiff requests that this Court permanently enjoin Defendants from representing, marketing, promoting, distributing, advertising or allowing or causing others to represent, market, promote, distribute, or advertise, their tanning devices:

- A. As a means or method of reducing any health risks or affecting any medical conditions;
- B. As a means or method to prevent or reduce the incidences or degree of any cancers;
- C. As a means or method by which consumers can safely increase their exposure to vitamin D or increase their levels of vitamin D;
- D. As anything other than devices to tan the skin;
- E. Without disclosing that the only use for tanning devices authorized by FDA is to tan the skin;
- F. For uses not included by classification by the FDA and misbrand the devices; and
- G. In any manner that results in the dissemination of false advertising of a device.

### **XVI. PRAYER**

16.1 Plaintiff hereby incorporates paragraph 15.1, as if set forth in full.

16.2 Plaintiff State of Texas further respectfully prays that this Court:

A. Order Defendants to restore all money or other property taken from identifiable persons by means of unlawful acts or practices, or in the alternative award judgment for damages to compensate for such losses;

B. Adjudge against Defendants civil penalties in favor of Plaintiff State of Texas in the amount of up to \$20,000 per violation of the DTPA;

C. Adjudge against Defendants civil penalties in favor of Plaintiff State of Texas in the amount of up to \$25,000 per day for each violation of the Texas Health & Safety Code (See TEX. HEALTH & SAFETY CODE §§ 145.0121(b), 431.0585(b));

D. Order Defendants to pay Plaintiff State of Texas' reasonable attorney fees, investigative costs for the Office of the Attorney General and the Texas Department of State Health Services, court costs, witness fees, and other expenses pursuant to the TEX. GOV'T CODE § 402.006(c) and TEX. HEALTH & SAFETY CODE §§ 145.0121, 431.047(d).

E. Order Defendants to pay both pre-judgment and post judgment interest on all awards of restitution, damages or civil penalties, as provided by law; and

F. Grant any further relief, at law or in equity, to which Plaintiff State of Texas may show itself entitled.

Respectfully submitted,

GREG ABBOTT  
Attorney General of Texas

KENT C. SULLIVAN  
First Assistant Attorney General

JEFF L. ROSE  
Deputy First Assistant Attorney General

PAUL D. CARMONA  
Chief, Consumer Protection & Public Health Division



PAT TULINSKI  
SBN 20283485  
Assistant Attorney General  
Consumer Protection & Public Health Division  
Capitol Station, P.O. Box 12458  
Austin, Texas 78711-2548  
Tel: (512) 463-2185  
Fax: (512) 473-8301

Attorneys for Plaintiff

Worldwide (All) | English

Sign Up | QuickList (0) | Help | Sign In

Home

Videos

Channels

Community

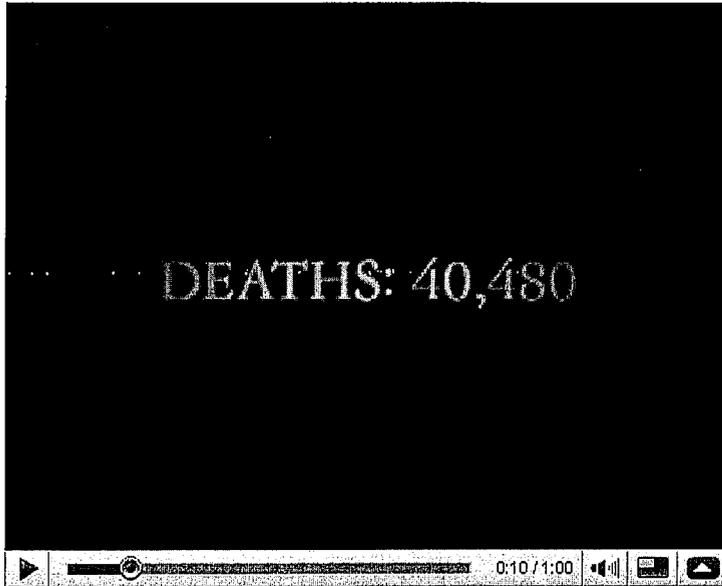
Videos

Search

advanced

Upload

### Darque Tan - Breast Cancer Research - 60 sec



watch in high quality

**Rate:** 2 ratings **Views:** 74

[Share](#) [Favorite](#) [Playlists](#) [Flag](#)

MySpace Facebook Digg [more share options](#)

**Commentary** **Statistics & Data**

Video Responses: 0 Text Comments: 0

Video Responses (0) [Sign in to post a Video Response](#)

Text Comments (0) [Sign in to post a Comment](#)

**Would you like to comment?**  
[Join YouTube](#) for a free account, or [sign in](#) if you are already a member.

**From:** DarqueTanCorp **Subscribe**  
**Added:** September 21, 2008  
[\(more info\)](#)

Help promote Vitamin D Breast Cancer Research. [www.v...](#)

**URL:** <http://www.youtube.com/watch?v=R13ddeSZ2sA>

**Embed:** `<object width="425" height="344"><param name="movie" \`

#### More From: DarqueTanCorp

**Darque Tan - Breast Cancer Research - 30 sec**  
 00:31 From: DarqueTanCorp  
 Views: 24

**Darque Tan - Vitamind D - spot 2**  
 00:30 From: DarqueTanCorp  
 Views: 1,498

**Darque Tan - Vitamind D**  
 00:30 From: DarqueTanCorp  
 Views: 2,985

[See all 4 videos](#)

#### Related Videos

#### Promoted Videos

Selena Gomez Tell Me So... 03:20 anothercind...	BLASSREI TER Episode: 24 ... 23:21 animeBLASSR...	Financia I crisis 'like ... 02:46 bbcworldnews	Rain Check 02:27 hotforwards

Add to iGoogle

Videos

Search

Face The Candidates

#### Your Account

- [Videos](#)
- [Favorites](#)
- [Playlists](#)
- [Inbox](#)
- [Subscriptions](#)
- [more...](#)

#### Help & Info

- [Help Resources](#)
- [Safety Tips](#)
- [Developer APIs](#)
- [Advertising](#)
- [YouTube Handbook](#)
- [Community Help Forums](#)
- [Copyright Notices](#)
- [Community Guidelines](#)
- [YouTube On Your Site](#)

#### YouTube

- [Company Info](#)
- [TestTube](#)
- [Terms of Use](#)
- [Privacy Policy](#)
- [Press](#)
- [Contact](#)
- [Blog](#)
- [Jobs](#)

© 2008 YouTube, LLC

