

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION**

JLW-TW Corp. d/b/a Suntan Supply
35350 Chester Road
Avon, Ohio 44011,

Plaintiff,

vs.

Merchant Capital, LLC
5311 Kane Road
Eau Claire, WI 54703

New Sunshine, LLC
6270 Corporation Drive, Suite 250
Indianapolis, Indiana 46278-2900,

Australian Gold, LLC
6270 Corporation Drive, Suite 250
Indianapolis, Indiana 46278-2900,

Cal Tan, LLC
6270 Corporation Drive, Suite 250
Indianapolis, Indiana 46278-2900,

Designer Skin, LLC
6270 Corporation Drive, Suite 250
Indianapolis, Indiana 46278-2900,

ETS, LLC
7445 Company Drive
Indianapolis, Indiana 46237

Defendants.

CASE NO.

JUDGE

COMPLAINT

JURY DEMAND ENDORSED HEREON

Plaintiff, JLW-TW Corp. d/b/a Suntan Supply, by and through counsel, for its
Complaint against Defendants states the following:

PARTIES AND JURISDICTION

1. Plaintiff, JLW-TW Corp. dba Suntan Supply (“Suntan Supply”) is a Domestic Corporation incorporated in the State of Ohio. JLW-TW is a distributor of indoor tanning products and equipment and maintains its principal place of business in the City of Avon, Lorain County, Ohio.

2. Defendant Merchant Capital, LLC (“Merchant Capital”) is a Limited Liability Company incorporated in the State of Wisconsin. Merchant Capital is the managing entity of New Sunshine, LLC.

3. Defendant New Sunshine, LLC (“New Sunshine”) is a Limited Liability Company incorporated in the State of Indiana. New Sunshine is the parent company of Defendants DTS, LLC; Australian Gold, LLC; Cal Tan, LLC; and Designer Skin, LLC. New Sunshine, along with the other Defendants, is engaged in the manufacture of lotions and creams for skin protection and care, and the licensure of point-of-sale software for the indoor tanning industry.

4. Defendant Australian Gold, LLC (“Australian Gold”) is a Limited Liability Company incorporated in the State of Indiana.

5. Defendant Cal Tan, LLC (“Cal Tan”) is a Limited Liability Company incorporated in the State of Indiana.

6. Defendant Designer Skin, LLC (“Designer Skin”) is a Limited Liability Company incorporated in the State of Arizona.

7. Defendant ETS, LLC (“ETS”) is a Limited Liability Company incorporated in the State of Indiana.

8. All of the above Defendants will be hereinafter, collectively referred to as the “Defendants.”

9. The conduct and injuries giving rise to the claims below arose in Ohio.

10. Jurisdiction and venue are proper.

FACTS

Unlawful Price Discrimination Through Distributor Program Pricing Levels

11. Beginning in or around 1992, Suntan Supply and Defendants had an ongoing business distribution relationship, wherein Suntan Supply would purchase and resell Defendant’s tanning products to Suntan Supply’s customer base.

12. Throughout the period beginning in or around 2010, and continuing to the present, similar agreements for purchase and resale existed between Defendants and at least fourteen (14) other Distributors, with whom Suntan Supply directly competes for customers. Such other Distributors include All Hours Distribution; CTS/TNG Worldwide; Four Seasons Sales and Service; Future Industries; Heartland Tanning Supplies; International Tan Makers; PC Tan; Silver Image; Sunbed Supply; Sun Club; Tan International; Tanning Supplies Unlimited; Ultraviolet Resources; and Year Round Brown (hereinafter collectively referred to as “Distributors”).

13. Throughout the period beginning in or around 2010 and continuing to the present, Defendants had in place “Distributor Programs” under which Distributors qualify for different “pricing levels” based on order volume. Also, rebates were extended to Distributors based on order volume and percentage increase in sales of Defendants’ tanning products from the previous year.

14. The Distributor Programs are structured using “pricing levels,” so that Distributors are placed in a level based on order volume. Distributors ultimately receive a reduced price at which they may purchase Defendants’ tanning products that corresponds with the level within which that particular Distributor falls.

15. Each year, Defendants publish a chart delineating the pricing levels that will be applied to Distributors. The chart is circulated to all Distributors each year. *See* for example 2015 Distributor Programs, a true and accurate copy of which is attached hereto as Exhibit A.

16. One such program, the 2015 Lotion Pricing Levels, created 4 Levels (Levels 1-4) based on order volume. At Level 1, Distributors ordering \$11 million or more in inventory from Defendants would receive a price of 66% off; at Level 2, Distributors ordering \$3 million-\$10,999,999 would receive a price of 65% off; at Level 3, Distributors ordering between \$750,000 and \$2,999,999 would receive a price of 63% off; and at Level 4, Distributors ordering less than \$750,000 in inventory would receive a price of 61% off.

17. Throughout the period beginning in or around 2010, and continuing to the present, Defendants gave certain preferred Distributors, through secret side deals, the opportunity to take advantage of prices better than those at their corresponding pricing level. For example, as it relates to the 2015 Lotion Pricing Levels, a certain preferred Distributor who would ordinarily be placed within Level 3 based upon its order volume would actually be charged the better price(s) associated with Levels 2 or 1.

18. The favorable pricing outside a Distributor’s earned pricing level was only given to certain Distributors through secret side deals with Defendants, and not offered to all Distributors, including Suntan Supply. Upon information and belief, these unfair

discriminatory pricing advantages were afforded to at least Four Seasons Sales and Services and Future Industries, who are not parties to this action.

19. Throughout the period beginning in or around 2010 and continuing to the present, and in addition to the Lotion Pricing Levels, Defendants had rebate programs in place for sales related specifically to certain tanning products, including “lotion,” “sunless solution,” and “sunless retail,” among others. Each of these product-specific rebate programs utilized a tier system, allowing Distributors to earn rebates based on increase in sales volume for a given year. Due to the previously-described unfair and discriminatory pricing scheme, it was easier for Distributors receiving unfair favorable pricing to take advantage of such rebates, creating a competitive advantage for those Distributors receiving favorable pricing, and a disadvantage for those who were not, including Suntan Supply.

20. The above described pricing programs, and secret side deals extending therefrom, amount to unlawful price discrimination. Defendants have continuously and unlawfully offered identical products for sale at discriminatory prices, resulting in significant harm to Suntan Supply’s business.

21. Through operation of the discriminatory pricing offered to certain Distributors, through secret side deals, Suntan Supply effectively paid in excess of \$1 million dollars more than other similarly-situated competitor Distributors, for exactly the same products, throughout the period beginning in or around 2010 and continuing to the present.

22. Suntan Supply directly competes with the other Distributors, including the preferred Distributors who received a favorable price that did not properly correspond with their order volume, in the market for tanning products.

23. The competitive opportunities of Suntan Supply were injured when they had to pay Defendants substantially more for their tanning products than their competitors were required to pay.

Other Unlawful Conduct

24. Suntan Supply incorporates by reference the foregoing as if fully re-alleged herein.

25. Beginning in or around 1992, Suntan Supply and Defendants had an ongoing business distribution relationship, wherein Suntan Supply would purchase and re-sell Defendants' tanning products to Suntan Supply's customer base.

26. As part of this ongoing distribution relationship, Defendants and Suntan Supply routinely engaged in negotiations and discussions regarding inventory, Defendants' pricing, balances, and future products/business dealings.

27. In those discussions, Suntan Supply asked Defendants about their pricing strategies; specifically, the disparities in pricing offered to other Distributors that did not correspond with that Distributor's order volume.

28. In light of these ongoing discussions and negotiations, Suntan Supply and Defendants entered into several confidentiality, non-disclosure agreements.

29. For example, on or about August 10, 2009, Suntan Supply and Defendants executed a Confidentiality and Non-Disclosure Agreement for Audit ("the Non-Disclosure Agreement"), pursuant to which Defendants agreed to keep confidential to any third party certain defined confidential information, including but not limited to, customer lists and related customer information. A true and accurate copy of this Non-Disclosure Agreement is

attached hereto as Exhibit B.

30. On or about March 26, 2015, Defendants notified Suntan Supply that they were terminating the business distribution relationship between the parties.

31. Suntan Supply learned that, on that same day, Defendants had also notified Suntan Supply's direct competitors that the business distribution relationship between Defendants and Suntan Supply had been terminated.

32. The next day, Suntan Supply learned that Defendants distributed Suntan Supply's confidential customer list and corresponding, confidential customer information to Suntan Supply's direct competitors, despite the fact that said confidential information was protected by the various confidentiality, non-disclosure agreements executed by the parties.

33. As a result of Defendants' unlawful conduct, Suntan Supply's existing customers have been generally and specifically solicited by Suntan Supply's direct competitors.

34. In addition, Defendants also directly contacted Suntan Supply's existing customers to inform them that Suntan Supply was no longer authorized to sell Defendants' products. Defendants then provided Suntan Supply's customers with a comprehensive list of Suntan Supply's competitors and the competitors' contact information, encouraging those customers to sever their existing business relations with Suntan Supply and obtain new contracts with Suntan Supply's competitors.

FIRST CAUSE OF ACTION
(Violation of the Robinson-Patman Act, 15 U.S.C. 13(a))

35. Suntan Supply incorporates by reference the foregoing as if fully re-alleged herein.

36. Defendants have violated section 2(a) of the Clayton Act, as amended by the

Robinson-Patman Act (15 U.S.C. § 13(a)), by discriminating in the price of tanning products, which are commodities, in contemporaneous sales to competing purchasers in interstate commerce, where the tanning products are sold for use in the United States. The violations occurred in the course of such commerce.

37. The discrimination has been sustained since at least in or around 2010, when Defendants began offering the Distributor Programs.

38. The effect of the discrimination is significant and serves to substantially limit competition in the markets in which Suntan Supply competes with other Distributors of tanning products, some of whom received improper pricing benefits.

39. Defendants effectuated the price discrimination through the sale of goods of like grade and quality. Defendants offered for sale the same tanning products to all Distributors, at unlawful discriminatory price levels.

40. Throughout the period beginning in or around 2010 and continuing to the present, Defendants have made numerous sales of identical tanning products to various Distributors at unlawful discriminatory prices.

41. Throughout the period beginning in or around 2010 and continuing to the present, Suntan Supply actively competes with the other Distributors who received a unfair discriminatory price for Defendants' tanning products. Various other Distributors, including Four Seasons Sales and Service, Inc. (not a party to this action), one of Suntan Supply's largest competitors, has actively engaged in solicitation of Suntan Supply's customers, indicating direct competition for customers.

42. Suntan Supply has suffered a competitive disadvantage, through being

required to pay substantially more for tanning products than their competitors who were offered better prices by Defendants than those that corresponded with that Distributor's sales order volume pricing level.

43. As a result of Defendants' ongoing violation of 15 U.S.C. 13(a), Suntan Supply has suffered significant damages in the form of lost profits, existing and future business opportunities, and has lost a significant number of customers to competitors receiving more favorable pricing from Defendants. Pursuant to the Robinson-Patman Act, damages are trebled.

44. As Defendants continue their ongoing discriminatory pricing conduct, Suntan Supply continues to suffer ongoing lost profits in an amount to be proven at trial.

45. Suntan Supply is entitled to an award of its reasonable attorney's fees and costs in connection with this claim.

SECOND CAUSE OF ACTION
(Breach of Contract – Non-Disclosure Agreement)

46. Suntan Supply incorporates by reference the foregoing as if fully re-alleged herein.

47. Pursuant to Section 1 of the Non-Disclosure Agreement, "Confidential Information" includes, but is not limited to, Suntan Supply's business records and any oral and written information regarding Suntan Supply's clients, including, but not limited to, customer lists and customer information including names, addresses, and services.

48. Pursuant to Section 4 of the Non-Disclosure Agreement, Defendants' obligations related to Suntan Supply's Confidential Information "shall remain in full force and effect until such Confidential Information becomes generally known to, or readily

ascertainable by proper means by the public and shall survive the termination of this Agreement.”

49. Pursuant to Section 3 of the Non-Disclosure Agreement, Defendants acknowledged that the “disclosure or use of the Confidential Information in violation of this Agreement shall give rise to irreparable harm and injury to [Suntan Supply], inadequately compensable in monetary damages,” and agreed that Suntan Supply would be additionally entitled to “equitable relief, including an injunction and specific performance, in the event of any breach or threatened breach of this Agreement by the [Defendants].”

50. On or about March 26, 2015, Defendants breached the terms of the Non-Disclosure Agreement by distributing Suntan Supply’s customer list and corresponding customer information to Suntan Supply’s direct competitors, without the prior written consent of Suntan Supply, which was required under the explicit terms of the Non-Disclosure Agreement.

51. As a direct and proximate result of Defendants’ breach of the Non-Disclosure Agreement, Suntan Supply has suffered, and will continue to suffer, irreparable harm and financial loss, unless it receives injunctive relief.

THIRD CAUSE OF ACTION
(Tortious Interferences with Business Relations)

52. Suntan Supply incorporates by reference the foregoing as if fully re-alleged herein.

53. Business relationships exist between Suntan Supply and its customers.

54. These customers have executed contracts with Suntan Supply, stating their intent to have Suntan Supply provide them with tanning products and Suntan Supply

expects future business from these customers as well.

55. Defendants were aware of these business relationships between Suntan Supply and Suntan Supply's customers.

Distribution of Confidential Information to Competitors

56. Without any privilege or justification, Defendants knowingly, intentionally, and purposefully interfered with these customer relationships by distributing Suntan Supply's customer list and customer information to Suntan Supply's direct competitors.

57. In doing so, Defendants encouraged and induced Suntan Supply's competitors to directly solicit Suntan Supply's customers, so that those customers would cease doing business with Suntan Supply and obtain contracts with Suntan Supply's competitors.

58. Defendants have wrongfully used, and continue to use, Suntan Supply's confidential information to take business away from Suntan Supply and have damaged Suntan Supply's goodwill with its existing customers.

Communications with Suntan Supply's Customers

59. Additionally, without any privilege or justification, Defendants knowingly, intentionally, and purposefully interfered with Suntan Supply's customer relationships by directly notifying Suntan Supply's customers of the termination of the distribution partnership between Suntan Supply and Defendants, and providing those customers with a comprehensive list of Suntan Supply's competitors' contact information.

60. Defendants directly notified Suntan Supply's customers in order to induce, solicit, and compel those customers to cease doing business with Suntan Supply and

instead, obtain contracts with Suntan Supply's competitors.

61. Suntan Supply has lost, and will continue to lose, substantial amounts of business as a result of Defendants' unlawful interferences, which were undertaken with a motive to interfere with Suntan Supply's business relations and to harm Suntan Supply. Suntan Supply's customer relationships have been harmed by the actions of Defendants.

62. As a direct and proximate result of said willful, intentional, and malicious interferences with Suntan Supply's customer relationships, Suntan Supply has incurred and will continue to incur monetary damages in an amount exceeding \$75,000 to be proven at trial, as well as irreparable harm to their professional reputation in the industry.

63. Further, given the malicious nature of Defendants' interferences, Suntan Supply is entitled to punitive damages in an amount to be determined at trial.

PRAYER FOR RELIEF

Suntan Supply seeks judgment against Defendants in an amount in excess of \$75,000 to fully, fairly, and justly compensate her for injury damage and loss, and respectfully prays that this Court enter judgment in its favor and award it past and future economic and non-economic compensatory damages, consequential damages, incidental damages, punitive damages, all reasonable attorneys' fees, costs, and expenses, injunctive relief, and any additional legal or equitable relief available under law.

Respectfully submitted,

/s/ Brian C. Lee

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JLW-TW Corp. d/b/a Suntan Supply

JURY DEMAND

Plaintiff demands a trial by jury on Plaintiff's Complaint.

/s/ Brian C. Lee

BRIAN C. LEE (0081675)

Attorney for Plaintiff

JLW-TW Corp. d/b/a Suntan Supply