

FILED / PRODUIT

Date: September 7, 2011

CT- 2011-007

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

CT-2011-

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER of the *Competition Act*, R.S.C. 1985, c. C-34, as amended;

AND IN THE MATTER of a Consent Agreement pursuant to section 74.12 of the *Competition Act* with respect to certain deceptive marketing practices of the Respondent under paragraphs 74.01(1)(a) and 74.01(1)(b) of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

BEIERSDORF CANADA INC.

Respondent

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition (the “Commissioner”) is responsible for the administration and enforcement of the *Competition Act* (the “Act”);

AND WHEREAS the Respondent is a wholly-owned subsidiary of Beiersdorf AG, a global company and holder of the NIVEA™ brand;

AND WHEREAS the Respondent is the seller of the NIVEA™ brand products, including the NIVEA *My Silhouette*™ product (the “Product”), which is available throughout Canada;

AND WHEREAS since at least October 2008, the Respondent has promoted the Product to the public by making representations (the “Representations”) that create the general impression that the Product slims and reshapes the body, causing a reduction of up to three centimetres on targeted areas of the body, while making the skin better toned and more elastic;

AND WHEREAS the Commissioner has concluded that the Representations are false or misleading in a material respect, contrary to paragraph 74.01(1)(a) of the Act;

AND WHEREAS the Commissioner has concluded that the Representations are performance claims to the public that were not based on adequate and proper testing, contrary to paragraph 74.01(1)(b) of the Act;

AND WHEREAS the Respondent has made the Representations regarding the Product to the public via its website (www.nivea.ca), as well as on the product packaging;

AND WHEREAS the Respondent has represented to the Commissioner that it has stopped shipping the Product to Canada, has stopped accepting further orders for the Product in Canada and has commenced the process of removing the Representations, including Product packaging, from the Canadian marketplace;

AND WHEREAS for the purposes only of this Agreement, including execution, registration, enforcement, variation or rescission, the Respondent does not contest the Commissioner's conclusions, but does not accept the Commissioner's allegations and nothing in this Agreement shall be taken as an admission or acceptance by the Respondent thereof nor shall it derogate from any rights or defences of the Respondent against third parties;

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Consent Agreement which, upon registration, shall have the same force and effect as an order of the Competition Tribunal;

NOW THEREFORE in order to resolve the Commissioner's concerns, the Parties hereby agree as follows:

I. INTERPRETATION

1. For the purpose of the Agreement, the following definitions shall apply:

- (a) **“Act”** means the *Competition Act*, R.S.C. 1985, c. C-34, as amended;
- (b) **“Agreement”** means this Consent Agreement entered into by the Respondent and the Commissioner pursuant to section 74.12 of the Act;
- (c) **“Beiersdorf”** means Beiersdorf Canada Inc., incorporated federally in Canada on January 1, 1991, including any present or future subsidiary corporation of Beiersdorf Canada Inc. within the meaning of subsection 2(3) of the Act;
- (d) **“Commissioner”** means the Commissioner of Competition appointed pursuant to section 7 of the Act, and her authorized representatives;
- (e) **“Parties”** means the Commissioner and the Respondent;
- (f) **“Person”** means any individual, corporation, partnership, firm, association, trust, unincorporated organization or other entity;

- (g) **“Product”** means NIVEA *My Silhouette*TM;
- (h) **“Related Person”** means any Person controlled within the meaning of the Act directly or indirectly by the Respondent, including any subsidiary corporation;
- (i) **“Respondent”** means Beiersdorf Canada Inc.;
- (j) **“Respondent's Personnel”** means all current and future Respondent and Related Person's senior management, in addition to all other employees who are materially involved in the formulation and/or implementation of advertising or marketing policies with respect to the Product; and
- (k) **“Tribunal”** means the Competition Tribunal.

II. COMPLIANCE WITH THE DECEPTIVE MARKETING PRACTICES PROVISIONS OF THE COMPETITION ACT

2. The Respondent, the Respondent's Personnel and Related Persons shall comply with the deceptive marketing practices provisions of the Act, including paragraphs 74.01(1)(a) and 74.01(1)(b), which provide:
 - 74.01 (1) A person engages in reviewable conduct who, for the purpose of promoting, directly or indirectly, the supply or use of a product or for the purpose of promoting, directly or indirectly, any business interest, by any means whatever,
 - (a) makes a representation to the public that is false or misleading in a material respect;
 - (b) makes a representation to the public in the form of a statement, warranty or guarantee of the performance, efficacy or length of life of a product that is not based on an adequate and proper test thereof, the proof of which lies on the person making the representation.
3. The Respondent shall, by the date of execution of this Agreement, commence and diligently pursue the process for causing the removal from the Canadian marketplace of the Representations found on Product packaging and available to the public, at retail or otherwise. In addition, upon the execution of this Agreement, the Respondent shall in good faith take all reasonable steps to cease making, causing to be made, or permitting to be made, by any means whatsoever, any other representation with respect to the Product that is false or misleading in a material respect or that is a performance claim that has not been substantiated, to the Commissioner's satisfaction, by an adequate and proper test in accordance with the Act.

III. PAYMENTS

ADMINISTRATIVE MONETARY PENALTY

4. The Respondent shall pay an administrative monetary penalty in the amount of three hundred thousand dollars (\$300,000).

COSTS

5. The Respondent shall pay the Competition Bureau for costs and disbursements incurred during the course of its investigation into this matter in the amount of eighty thousand dollars (\$80,000).

RESTITUTION

6. During the period commencing on the date of the execution of this Agreement, and ending on December 31, 2011, the Respondent shall refund, as soon as reasonably possible, the purchase price of the Product, plus shipping and handling, upon presentation of the Product or sales receipt by mail to: Beiersdorf Canada Inc., 2344 Alfred Nobel, Suite 100A, St. Laurent, QC H4S OA4, to any consumer or reseller who has purchased and not resold the Product in Canada that was supplied by the Respondent, as referenced in Appendix "A".
7. Should consumers or resellers return the Product to the Respondent, the latter undertakes not to resell the returned Product in Canada using false or misleading or unsubstantiated claims within the meaning of paragraphs 74.01(1)(a) and (b) of the Act including but not limited to the Representations.
8. The Respondent shall ensure that the toll-free telephone number identified in Appendix "A" of this Agreement is efficiently administered to respond promptly to refund claims and related enquiries, during the period commencing on the date of the execution of this Agreement and ending on December 31, 2011.

FORM OF PAYMENT

9. The payments referred to in paragraphs 4 and 5 above shall be made within five (5) business days of the execution of this Agreement, by certified cheque or by wire transfer payable to the Receiver General for Canada.

IV. CORRECTIVE NOTICE

10. The Respondent shall publish a corrective notice (the "Notice") as set out in Appendix "A" of this Agreement in accordance with the terms and conditions set out in Appendix "B" of this Agreement.

V. COMPLIANCE REPORTING AND MONITORING

11. The Respondent shall present to the Commissioner:
 - (a) Twenty-one (21) days after the execution of this Agreement, a written confirmation that:
 - (1) steps to remove the Representations with respect to the Product from the Canadian marketplace have been taken as required by paragraph 3;
 - (2) the Notice has been, or is in the process of being, disseminated as required by paragraph 10; and
 - (3) all Respondent's Personnel have received a copy of this Agreement as required by paragraph 14;
 - (b) Thirty-five (35) days after the execution of this Agreement, the signed and dated statements requested in paragraph 14; and
 - (c) By January 31, 2012, a written report on the number of refunds paid by the Respondent and the number of refund requests that were rejected with explanations therefor, as set out in Appendix "A".
12. The Respondents shall provide to the Commissioner, within thirty (30) days following receipt of a written request from the Commissioner, such information in such form as the Commissioner requests for the purposes of monitoring compliance with this Agreement.
13. For the purpose of determining or securing compliance with this Agreement, subject to any valid claim to a legally recognized privilege, and upon written request, the Respondent shall permit any duly authorized representatives of the Commissioner:
 - (a) upon a minimum of two (2) days notice to the Respondent, access during office hours to inspect and copy all books, ledgers, accounts, correspondence, memorandum, and all other records and documents in the possession or under control of the Respondent relating to compliance with this Agreement; and
 - (b) upon a minimum of five (5) days notice to the Respondent, and without restraint or interference from the Respondents, access during office hours to interview directors, officers or employees of the Respondent on matters relating to compliance with this Agreement.

VI. GENERAL

14. During the term of this Agreement, the Respondent shall provide a copy of this Agreement to all Respondent's Personnel within fourteen (14) days after the date of this Agreement, and all future Respondent's Personnel will be provided with a copy of this

Agreement within fourteen (14) days after his or her appointment. Within fourteen (14) days after being provided with a copy of this Agreement, the Respondent shall secure from each such person a signed and dated statement acknowledging that he or she read and understood this Agreement and paragraphs 74.01(1)(a) and (b) of the Act.

15. Notices, reports and other communications required or permitted pursuant to any of the terms of this Agreement, shall be in writing and shall be considered to be given if dispatched by personal delivery, registered mail or facsimile transmission to the Parties at the following addresses:

(a) The Commissioner

Commissioner of Competition
Competition Bureau
Place du Portage, Phase
50 Victoria Street, 2 1st Floor
Gatineau, QC KIA OC9

Attention: Deputy Commissioner of Competition (Fair Business Practices)

Telephone: 819-997-1231
Facsimile: 819-953-4792

With a copy to:

Executive Director, Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase 1
50 Victoria Street, 22nd Floor
Gatineau, QC KIA OC9

Telephone: 819-953-3884
Facsimile: 819-953-9267

(b) The Respondent

Beiersdorf Canada Inc.
2344 Alfred Nobel, Suite 1 OOA
St. Laurent, QC H4S OA4

Attention: Larry LaPorta
General Manager

Telephone: 514-956-4330
Facsimile: 514-956-4346

16. This Agreement may be executed in two or more counterparts, each of which shall be an original instrument, and all of which taken together shall constitute one and the same instrument. In the event of any discrepancy between the English and French versions of this Agreement, the English version shall prevail.
17. The computation of time periods contemplated by this Agreement shall be in accordance with the *Interpretation Act*, R.S.C. 1985, c. 1-21. For the purpose of this Agreement, the definition of “holiday” in the *Interpretation Act* shall include Saturday. For purposes of determining time periods, the date of this Agreement is the last date on which it is executed by a Party.
18. The Parties consent to the immediate registration of this Agreement with the Tribunal.
19. Unless otherwise specified, this Agreement shall be binding upon the Respondent and all Related Persons as defined herein for a period of ten (10) years following the date of registration of this Agreement.

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20. In the event of a dispute as to the interpretation or application of this Agreement, any of the Parties shall be at liberty to apply to the Tribunal for an order or directions. The Parties agree that the Tribunal has jurisdiction to make such order as is required to give effect to this Agreement.

DATED at Montreal, in the Province of Québec, this 1st day of September, 2011.

for: [Original signed by Lawrence LaPorta]
Beiersdorf Canada Inc.
Lawrence LaPorta
General Manager
I have authority to bind the corporation.

DATED at Gatineau, in the Province of Québec, this 6th day of September, 2011.

[Original signed by Melanie L. Aitken]
Commissioner of Competition
Per: Melanie L. Aitken
Commissioner of Competition

APPENDIX "A" - NOTICE

NOTICE BY BEIERSDORF CANADA INC.
RE: NIVEA MY SILHOUETTE™ ADVERTISEMENTS

The Competition Bureau has informed Beiersdorf Canada Inc. that representations made for the promotion of its NIVEA *My Silhouette*™ product violate the deceptive marketing practices provisions of the *Competition Act*.

The Bureau has concluded that the representations made by the company are false or misleading in a material respect as they create the general impression that regular use of NIVEA *My Silhouette*™ slims and reshapes the body, causing a reduction of up to three centimetres on targeted areas of the body, while making the skin better toned and more elastic. The Bureau has also concluded that the representations made by the company are not based on adequate and proper tests, as required by the *Competition Act*.

Beiersdorf Canada Inc. does not accept the Bureau's allegations. However, the company and the Commissioner of Competition have entered into a Consent Agreement to resolve this matter and, for the purposes of this Agreement, the company does not contest the Commissioner's conclusions.

Beiersdorf Canada Inc. is no longer promoting or shipping the product in the Canadian marketplace. The company has agreed to pay an administrative monetary penalty along with the Bureau's costs for its investigation, and to provide consumer refunds. Any consumers who have purchased NIVEA *My Silhouette*™ in Canada may obtain a full refund of the purchase price, plus shipping and handling, on request by sending the product, if available, or the sales receipt by or before December 31, 2011 to the following address:

Beiersdorf Canada Inc.
2344 Alfred Nobel, Suite 100A
St. Laurent, QC H4S 0A4
Toll Free: 1-888-307-4496 (English or French) (between 9 am to 5 pm EST)

The Consent Agreement has been filed with the Competition Tribunal for registration. Once it has been registered, the Agreement will be available on the Tribunal's website at: www.ct-tc.gc.ca. Additional information is available on the Competition Bureau's website at: www.competitionbureau.gc.ca

Appendix “B” - Terms and Conditions of Notice (Appendix “A”) Publication

(i) Website

1. The Respondent shall publish the Notice on the following website:

www.nivea.ca

2. The Respondent shall post the Notice on the website immediately, and in any event no later than seven (7) days after the execution of this Agreement, and shall maintain the Notice on the website until December 31, 2011.

3. The Notice shall be accessible through a link on the menu-bar of the website homepage, entitled “Notice - My Silhouette”. The Notice shall be the only content on that linked page.

4. The Notice shall contain a hyperlink to the Competition Tribunal website at www.ct-tc.gc.ca and to the Competition Bureau website at www.cb-bc.gc.ca.

5. The title of the Notice shall be capitalized and appear in no less than fourteen (14)-point bold font unembellished print, and the text of the Notice shall appear in no less than twelve (12)-point font unembellished print.

(ii) Newspapers

1. The newspapers in which the Respondent shall publish the Notice identified in Appendix “A” are:

Vancouver Sun Edmonton Journal Calgary Herald Winnipeg Free Press Ottawa Citizen	La Presse (French) Toronto Star Halifax Herald Limited Globe and Mail
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2. The Respondent shall publish the Notice set out in Appendix “A” in one Saturday edition of the newspapers listed above within a period of fourteen (14) days from the execution of this Agreement. The Respondent shall obtain publication space from each newspaper in accordance with the following hierarchy of availability, and every effort shall be made to obtain publication space in the following order of priority:

- (a) within the first five (5) pages of the cover section of the newspaper(s); and
- (b) within the first four (4) pages of the business section of the newspaper(s).

3. The Notice shall appear in a space no less than 6 inches x 4.5 inches in size when published in the newspapers named above.
4. The title of the Notice shall be capitalized and shall appear in fourteen (14)-point font unembellished print.
5. The text of the Notice shall appear in twelve (12)-point font unembellished print in the newspapers listed above.