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REGISTRAR / REGISTRARE

File No. CT-2010-06

OTTAWA, ONT.

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THE COMPETITION TRIBUNAL

IN THE MATTER OF the *Competition Act*, R.S.C. 1985, c. C-34, and the *Competition Tribunal Rules*, SOR/2008-141;

AND IN THE MATTER OF an inquiry commenced pursuant to section 10 of the *Competition Act* into certain reviewable conduct of Brent Marsall (also known as Brent Marshall), also doing business in Alberta as Dynasty Spas and Games Room, Dynasty Spas Inc., also doing business as EcoSmart Spas, and 1232466 Alberta Ltd., also doing business as Dynasty Spas;

AND IN THE MATTER OF the filing and registration of a consent agreement pursuant to section 74.12 of the *Competition Act*.

BETWEEN:

THE COMMISSIONER OF COMPETITION

Applicant

-and-

BRENT MARSALL (also known as Brent Marshall), also doing business in Alberta as DYNASTY SPAS AND GAMES ROOM, DYNASTY SPAS INC., also doing business as ECOSMART SPAS, and 1232466 ALBERTA LTD., also doing business as DYNASTY SPAS

Respondents

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition (the “**Commissioner**”) is responsible for the administration and the enforcement of the *Competition Act* (the “**Act**”), including the deceptive marketing practices provisions in Part VII.1 of the Act;

AND WHEREAS the Respondent, Dynasty Spas Inc., was incorporated under the laws of Alberta on the 6th day of February, 2007, with the corporate access number 2012992893, with EcoSmart Spas listed as a Trade Partner Name (registration number TN13489489), and the registered office address 212-20 Sunpark Plaza, SE, Calgary, Alberta, T2X 3T2;

AND WHEREAS the Respondent, 1232466 Alberta Ltd., was incorporated under the laws of Alberta on the 30th day of March, 2006, with the corporate access number 2012324667, with

Dynasty Spas listed as a Trade Partner Name (registration number TN13368659), and the registered office address 212-20 Sunpark Plaza, SE, Calgary, Alberta, T2X 3T2;

AND WHEREAS the Respondent, Brent Marsall, is the sole Director of Dynasty Spas Inc. and is a Director and voting shareholder of 1232466 Alberta Ltd.;

AND WHEREAS on February 19, 2009, the Commissioner commenced an inquiry pursuant to section 10 of the Act (“**Inquiry**”) into allegations that the Respondents imported, promoted, distributed and sold the Dynasty Spas brand of hot tubs and spas, and made representations that created the general impression that the Dynasty Spas and EcoSmart Spas product lines or their insulation (“**Products**”) met the criteria of the ENERGY STAR program when they did not;

AND WHEREAS the Respondents state that the Products’ insulation was manufactured with the ENERGY STAR trademark and certification mark (“**Marks**”) printed on it by R-Max Inc., not the Respondents;

AND WHEREAS the Respondents used the Marks in, on, and in association with point-of-sale advertising materials, the Internet, print advertising, Yellow Pages and other business directories (both online and in print), verbal representations both directly and by employees, salespersons and agents of the Respondents and in premises controlled by the Respondents (the “**Representations**”);

AND WHEREAS the Commissioner has concluded that, from March 2007, and continuing until at least April 2009, the Respondents directly or indirectly made or caused to be made the Representations relating to the ENERGY STAR program to the public for the purposes of promoting the Products; that such Representations were false or misleading in a material respect and, thereby, the Respondents engaged in reviewable conduct contrary to subparagraph 74.01(1)(a) of the Act;

AND WHEREAS the Commissioner has been informed that the ENERGY STAR program, administered in Canada by Natural Resources Canada through the Office of Energy Efficiency, a Department of the Canadian government, does not and has never recognized the Products as being ENERGY STAR rated, qualified, certified, endorsed, and/or associated with the ENERGY STAR program in any form whatsoever;

AND WHEREAS the Commissioner and the Respondents (the “**Parties**”) are satisfied that this matter can be resolved with the registration of this Consent Agreement;

AND WHEREAS nine other dealers have also entered into Consent Agreements with the Commissioner in relation to Products that were imported or distributed by the Respondents;

AND WHEREAS the Respondents are committed to compliance with the Act generally, and the deceptive marketing practices provisions of the Act (Part VII.1) specifically;

AND WHEREAS the Parties agree that, upon the signing of this Consent Agreement, the Parties shall file the Consent Agreement with the Competition Tribunal for immediate registration as an order thereof;

AND WHEREAS the Parties understand that, upon registration, pursuant to section 74.12 of the Act, this Consent Agreement has the same force and effect as if it were an order of the Competition Tribunal;

NOW THEREFORE, in order to resolve the Commissioner's conclusions as to violations of subparagraph 74.01(1)(a) of the Act, 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. **“Affiliate”** shall have the meaning ascribed to it in the Act;
 - c. **“Agreement”** means this Consent Agreement entered into by the Respondents and the Commissioner pursuant to section 74.12 of the Act, including the preamble;
 - d. **“Commissioner”** means the Commissioner of Competition, appointed pursuant to section 7 of the Act, and her authorized representatives;
 - e. **“Company Senior Management”** means Brent Marsall and Rochelle Marsall, and any future Officers or Directors of Dynasty Spas Inc. and 1232466 Alberta Ltd.;
 - f. **“Marks”** means the ENERGY STAR trademark (Reg. No. TMA541652) and certification mark (Reg. No. TMA553531) registered with the Canadian Intellectual Property Office by the US Environmental Protection Agency on February 27, 2001 and November 7, 2001, respectively;
 - g. **“Parties”** means the Commissioner of Competition and the Respondents;
 - h. **“Person”** means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity;
 - i. **“Products”** means the Dynasty Spas and EcoSmart Spas product lines or their insulation;

- j. **“Related Person”** means the Respondents, their Affiliates, any present or future persons under the control of the Respondents and their Affiliates, and includes Company Senior Management;
- k. **“Respondents”** means Brent Marsall (also known as Brent Marshall), also doing business in Alberta as Dynasty Spas and Games Room, Dynasty Spas Inc., also doing business as EcoSmart Spas, and 1232466 Alberta Ltd., also doing business as Dynasty Spas; and
- l. **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

II. APPLICATION

- 2. The provisions of the Agreement shall apply to:
 - a. the Respondents, all corporations (including the principals thereof), partnerships or persons under legal or contractual obligation to the Respondents or who, in connection with the marketing or sale of the Products, act for, on behalf of, or in concert with the Respondents, including the directors, officers and employees of the Respondents, their respective successors and assigns, and other persons including agents, representatives and associates of the Respondents;
 - b. Company Senior Management; and
 - c. the Commissioner.

A. NO FALSE OR MISLEADING STATEMENTS

- 3. The Respondents and any Related Person shall comply with the deceptive marketing practices provisions of the Act, which include:

“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”.*
- 4. Neither the Respondents nor any Related Person shall make, cause to be made, or permit to be made on their behalf, any representation to the public, by any means, that is false or misleading in a material respect.

5. Neither the Respondents nor any Related Person shall make, cause to be made, or permit to be made on their behalf, any representation to the public, by any means, 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 including, but not limited to, claims of energy efficiency, energy consumption and/or costs of operation.

B. CORRECTIVE ACTIONS

6. The Respondents 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.
7. No later than three (3) weeks after the date of the filing for registration of this Agreement, the Respondents shall provide a notice to the Commissioner confirming that the Notice was published as required by paragraph 6 of this Agreement. The notice to the Commissioner shall include proof of publication of the Notice in each form referred to in Appendix “B”.

C. CORPORATE COMPLIANCE PROGRAM

8. Within four (4) weeks after the date of the filing for registration of this Agreement, the Respondents shall implement a corporate compliance program (the “**Compliance Program**”) and conduct their business in a manner consistent with the Commissioner’s Information Bulletin on “Corporate Compliance Programs” published on September 27, 2010 (available online at www.competitionbureau.gc.ca).
9. Company Senior Management shall fully support and enforce the Compliance Program and shall take an active and visible role in its establishment and maintenance.
10. Within four (4) weeks after the date of the filing for registration of this Agreement, each member of Company Senior Management shall acknowledge his or her commitment to the Compliance Program by signing and delivering to the Commissioner a commitment letter in the form set out in Appendix “C” of this Agreement.
11. The Respondents shall require all employees and members of their personnel to complete an annual written acknowledgement of their awareness and comprehension of the Compliance Program as provided in Appendix “D” of this Agreement, and shall retain the completed acknowledgement forms throughout the term of this Agreement.
12. In the marketing of products, services, and business interests, the Respondents shall conduct their business having due regard to the new advertising guidelines published jointly by the Canadian Standards Association and the Commissioner in June 2008, entitled *Environmental claims: A guide for industry and advertisers* (available online at www.competitionbureau.gc.ca), in particular, but not limited to, the following clauses:

- a. **Clause 4.4 (Vague & Non-Specific Claims)** – *“If vague claims relating to the environment are used as slogans and are not based on real environmental protection and/or benefit, they could be considered false or misleading. Such claims must be based on adequate and proper tests undertaken prior to making such representations to the public, if they relate or refer to the environmental performance or efficacy of a product. Environmental claims that are vague, non-specific, incomplete, or irrelevant and that cannot be supported through verifiable test methods should not be used.”*
- b. **Clause 5.10 (False Third Party Certification Claims)** – *“Self-declared environmental claims, including any explanatory statements, shall be presented in a manner which does not imply that the product is endorsed or certified by an independent third-party organization [such as the ENERGY STAR program] when it is not.”*
- c. **Clause 8.1 (Responsibilities of the Claimant)** – *“The intended purpose of self-declared environmental claims is to allow organizations to make claims without the requirement to hire a third party to award a seal or logo. However, this does not lessen the responsibility of the manufacturer, distributor, dealer, retailer, importer, or anyone in the supply chain making the claim to be able to support it with accurate data...it is the sole responsibility of the claimant to produce and provide data necessary to support the claim being made.”*

D. REPORTING AND MONITORING

13. The Respondents shall provide to the Commissioner, within 30 days after receipt of a written request from the Commissioner, such information in such form as the Commissioner may reasonably request for the purpose of monitoring compliance with this Agreement, including copies of any promotional materials and representations relating to Products promoted, marketed or distributed by the Respondents or Related Persons.
14. The Respondents shall submit to the Commissioner, on or before December 31 of each year during the term of this Agreement, a copy of any Yellow Pages advertisements, whether print or online, used during that year, and a photo or proof of any banners used by the Respondents at trade shows or in their retail locations during that year in respect of Products.-

E. ADMINISTRATIVE MONETARY PENALTY AND COSTS

15. The Respondents shall pay an Administrative Monetary Penalty in the sum of \$130,000, payable to the Receiver General for Canada.
16. The Parties, including Rochelle Marsall, will be responsible for their own costs and disbursements incurred during the course of the Competition Bureau’s investigation into this matter.

17. The payment referred to in paragraph 15 shall be made no later than two (2) business days after the date of this Agreement. The Respondents shall pay \$130,000 by certified cheque or by wire transfer payable to the Receiver General for Canada.

F. FAILURE TO COMPLY

18. A failure to comply with the terms of this Agreement (including payment per paragraph 15) by the Respondents, their Affiliates or any Related Person shall be deemed to be a breach of this Agreement by the Respondents and is subject to such orders as the Tribunal or a court of competent jurisdiction may impose.
19. For the purpose of determining or securing compliance with this Agreement, the Commissioner agrees to provide the Respondents with three (3) weeks notice prior to seeking further orders from the Tribunal or a court of competent jurisdiction, to provide the Respondents an opportunity to satisfy the Commissioner that it is unnecessary for her to seek such further orders.

G. TERM OF AGREEMENT

20. Upon the signing of this Agreement, the Parties shall file the Agreement with the Tribunal for immediate registration thereof.
21. Unless otherwise specified, this Agreement shall be binding upon the Respondents and any Related Person as defined herein for a period of ten (10) years following the date of registration of this Agreement.

III. NOTICES

22. Notices pursuant to this Agreement shall be in writing and shall be considered to be given if dispatched by personal delivery, or by registered mail or facsimile transmission to the Parties at the following addresses or facsimile numbers:

(a) The Commissioner

Commissioner of Competition
Competition Bureau
Place du Portage, Phase I, 50 Victoria Street, 21st Floor
Gatineau, Quebec K1A 0C9
Attention: Deputy Commissioner (Fair Business Practices Branch)
Telephone: (819) 997-1231
Facsimile: (819) 953-4792

With copies to:

Director, Competition Bureau Legal Services
Department of Justice
Place du Portage, Phase I, 50 Victoria Street, 22nd Floor
Gatineau, Quebec K1A 0C9
Attention: Nikiforos Iatrou, Counsel
Telephone: (819) 953-6891
Facsimile: (819) 953-9267

(b) The Respondents

Brent Marsall
c/o 6119 Centre Street SW
Calgary, Alberta T2H 0C5

Dynasty Spas Inc.
6119 Centre Street SW
Calgary, Alberta T2H 0C5

1232466 Alberta Ltd.
c/o 6119 Centre Street SW
Calgary, Alberta T2H 0C5

IV. GENERAL

23. Pursuant to section 74.12(4) of the Act, upon registration of this Agreement with the Tribunal, the within proceedings will have terminated, and the Commissioner hereby acknowledges that such termination applies with equal force to the proceedings in respect of Rochelle Marsall.
24. The Agreement may be executed in two (2) or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
25. The Agreement shall be governed by, and interpreted in accordance with the laws of Canada applicable therein.
26. For greater certainty, the Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or the Respondents to rescind or vary any of the provisions of the Agreement in the event of a change of circumstances pursuant to section 74.13 of the Act.

The undersigned hereby agree to the registration of this Consent Agreement.

SIGNED at Calgary, in the Province of Alberta this 10th day of Jan, 2011.

[original is signed]
Respondent, **Brent Marsall**

[original is signed] c/s
Respondent, **Dynasty Spas Inc.**, per Brent Marsall, Director, Dynasty Spas Inc.

[original is signed] c/s
Respondent, **1232466 Alberta Ltd.**, per Brent Marsall, Director, 1232466 Alberta Ltd

SIGNED at Gatineau, in the Province of Quebec this 17th day of January, 2011.

[original is signed]
Melanie L. Aitken
Commissioner of Competition

Appendix “A” – Corrective Notice

CORRECTIVE NOTICE BY

Dynasty Spas Inc. (doing business as EcoSmart Spas) and 1232466 Alberta Ltd. (doing business as Dynasty Spas)

RE: Dynasty Spas/EcoSmart Spas Hot Tubs

The Competition Bureau (the “**Bureau**”) has informed Dynasty Spas Inc. (doing business as EcoSmart Spas) and 1232466 Alberta Ltd. (doing business as Dynasty Spas) that certain representations made, that the Dynasty Spas and EcoSmart Spas product lines or their insulation (“**Products**”) are associated with the ENERGY STAR program, have raised concerns under the deceptive marketing practices provisions (Part VII.1) of the *Competition Act* (the “**Act**”).

The Bureau has concluded that representations made through point-of-sale advertising materials, company websites, print advertising, Yellow Pages and other business directories (both online and in print), and verbal representations, both directly and by store employees and agents, created the false or misleading general impression that the Products met the ENERGY STAR criteria.

In recognition of the importance of providing accurate information to consumers, Dynasty Spas Inc., 1232466 Alberta Ltd., and the Commissioner of Competition have entered into a Consent Agreement (the “**Agreement**”) that addresses the Bureau’s concerns.

Dynasty Spas Inc. and 1232466 Alberta Ltd. have agreed to not make any further representations associating the Products with the ENERGY STAR program. They have also agreed to pay an administrative monetary penalty and implement a corporate compliance program designed to ensure compliance with the Act.

The 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. For additional information, consult the Bureau’s website at www.cb-bc.gc.ca.

Appendix “B” – Terms and Conditions of Corrective Notice Publication

(i) Web site

1. The Respondents shall publish the Notice on the following website:
 - <http://www.ecosmartspas.ca>
2. The Respondents shall post the Notice on the website no later than seven (7) days following the date of the filing for registration of this Agreement, and shall maintain the Notice on the website for a period of at least eight (8) consecutive weeks.
3. The Notice shall be accessible through a link on the menu-bar of the website homepage, entitled ‘*Dynasty Spas/EcoSmart Spas* Corrective Notice’.
4. The Notice shall have a link 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 Notice shall take up a full screen size of the linked page. The title of the Notice shall be capitalized and appear in no less than 12-point bold font unembellished print, and the text of the Notice shall appear in no less than 12-point font unembellished print.

(ii) Point of Sale

1. The Respondents shall display the Notice beginning no later than seven (7) days following the date of the filing for registration of this Agreement, and for a period of at least eight (8) consecutive weeks, in each of the following retail locations:
 - 6119 Centre St. SW, Calgary, Alberta, T2H 0C9
 - 2-6013 48 Ave., Red Deer, Alberta, T4N 3V5
2. The Notice shall be displayed in plain view at each store entrance, or in a conspicuous location near the entrance where it can be seen by all persons entering the premises. The Notice shall also be displayed at each cash register station in a manner that is legible and visible to all customers.
3. The Notice shall be no less than 8 ½ inches x 11 inches in size. The title of the Notice shall be capitalized and shall appear in no less than 16-point bold font unembellished print, and the text of the Notice shall appear in no less than 13-point font unembellished print.

Appendix “C” – Acknowledgement by Senior Management

[Dynasty Spas/EcoSmart Spas Letterhead]

[date], 20[]

CONFIDENTIAL

Commissioner of Competition
Competition Bureau
Place du Portage, Phase I
50 Victoria Street, 21st Floor
Gatineau (QC) K1A 0C9

Attention: Deputy Commissioner of Competition (Fair Business Practices Branch)

RE: Commitment to Establishment and Maintenance of Compliance Program

Further to paragraph 10 of the Consent Agreement between the Commissioner of Competition and Dynasty Spas Inc. (doing business as EcoSmart Spas) and 1232466 Alberta Ltd. (doing business as Dynasty Spas) dated [date], I hereby commit to the successful implementation of Dynasty Spas Inc. and 1232466 Alberta Ltd.’s Corporate Compliance Program, for the purpose of promoting compliance with the *Competition Act*, R.S.C. 1985 c. C-34 (as amended) (the “Act”), including the deceptive marketing practices provisions in Part VII.1 of the Act and specifically paragraphs 74.01(1)(a) and 74.01(1)(b). I will take an active and visible role in the establishment and maintenance of the Corporate Compliance Program.

Sincerely,

(Name and title)

Appendix “D” – Annual Acknowledgement by Respondents Personnel

I, _____, of the City of _____, am employed by [Dynasty Spas Inc. or 1232466 Alberta Ltd.] in the capacity of _____. In this capacity, I am materially involved in the formulation and/or the implementation of [Dynasty Spas Inc. or 1232466 Alberta Ltd.]’s [advertising/marketing and/or pricing] policies. I acknowledge that I am subject to and am required to comply with [Dynasty Spas Inc. or 1232466 Alberta Ltd.]’s Corporate Compliance Program with respect to the *Competition Act*, R.S.C. 1985 c. C-34 (as amended) (the “Act”).

This is to advise that I have read and understand [Dynasty Spas Inc. or 1232466 Alberta Ltd.]’s Compliance Program, the goal of which is to promote compliance with the Act generally, and paragraphs 74.01(1)(a) and 74.01(1)(b) specifically.

Date: ___/___/_____

Signature: _____