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File No. CT-2010-006

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 an inquiry pursuant to subparagraph 120(1)(b)(ii) of the Competition Act relating to the marketing practices of Brent Marshall (also known as Brent Marshall), also doing business in Alberta as Dynasty Spas and Games Room, Rochelle Marshall (also known as Rochelle Marshall), Dynasty Spas Inc., also doing business as Ecosmart Spas, and 1232466 Alberta Ltd., also doing business as Dynasty Spas;

AND IN THE MATTER OF an Application by the Commissioner of competition for an order pursuant to section 74.1 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, ROCHELLE MARSALL (also known as Rochelle Marshall), DYNASTY SPAS INC., also doing business as ECOSMART SPAS, and 1232466 ALBERTA LTD., also doing business as DYNASTY SPAS

Respondents

**RESPONSE OF BRENT MARSALL, DYNASTY SPAS INC.
and 1232466 ALBERTA LTD.**

I. ADMISSIONS AND DENIALS

1. Except where otherwise expressly admitted herein, the Respondents, Brent Marsall ("Marsall"), Dynasty Spas Inc. ("Dynasty") and 1232466 Alberta Ltd. ("#Co") (collectively, the "Respondents") deny each and every allegation contained in the Notice of Application ("Notice") filed by the Commissioner of Competition ("Commissioner") on July 20, 2010.

2. The Respondents admit the facts contained in paragraphs 6, 7, 8 and 11 of the Notice.

3. The Respondents further admit that:

- (a) Dynasty and #Co sell hot tubs (“tubs”) under the names “Dynasty” and “EcoSmart”;
- (b) Dynasty sells tubs at a single retail location in Calgary, Alberta;
- (c) #Co sells tubs at a single retail location in Red Deer, Alberta;
- (d) in addition, both Dynasty and #Co sell tubs at various temporary locations and trade shows; and
- (e) some of the tubs sold by Dynasty and #Co included a perimeter heat shield insulation system that included insulation materials manufactured by R-Max Inc. (“R-Max”) with the Energy Star logo (“logo”) printed on it by R-Max.

II. GROUNDS ON WHICH THE APPLICATION IS OPPOSED

4. In answer to the whole of the Notice, the Respondents deny that they made representations that were false or misleading in any material respect. In particular, and as further elaborated upon below, the Notice is opposed on the following grounds:

- (a) at no point were representations made, and at no time was the general impression conveyed to the public, that the tubs themselves were Energy Star approved;
- (b) all representations related solely to the tub’s insulation, which was manufactured and supplied by R-Max, not the Respondents, with the logo printed on it by R-Max;
- (c) likewise, the majority of the promotional materials referred to in the Notice were created by the tubs’ manufacturer, not the Respondents; and
- (d) finally, and most fundamentally, no consumers were materially misled. Dynasty’s and #Co’s customers understood and reasonably had the general impression that they were purchasing tubs that included a more energy efficient and

environmentally friendly insulation system – and, as further explained below, that is exactly what they received.

5. Further, or in the alternative, the Respondents state that this is not a case that warrants the payment of an administrative monetary penalty. Dynasty and #Co are small businesses. As particularized below, the Respondents were provided with contradictory and confusing information regarding the use of the logo. The period in question in the Notice is from an unspecified time in 2007 to on or about April 2009; however, it was not until on or about March 2009 that the Environmental Protection Agency (“EPA”) and Natural Resources Canada (“NRC”) took steps to address this confusion with the insulation’s manufacturer. The Respondents deny that they were put on notice that they were violating the *Competition Act* (“Act”). Marsall received only a telephone call from the Competition Bureau (“Bureau”) in or about February 2009 regarding the logo, wherein he requested further information and clarification from the Bureau, which it failed or refused to provide. In or around that same time period, the Bureau contacted other retailers and offered them an opportunity to address this situation without the payment of an administrative monetary penalty. No such opportunity was provided to the Respondents as they have been singled out by the Bureau in this regard.

6. Furthermore, the Respondents acted prudently and diligently, and honestly believed that they were entitled to refer to the logo, which was printed on the insulation by its manufacturer, R-Max. The Respondents plead and rely upon the provisions of section 74.1(3) of the Act.

7. The material facts and particular grounds on which the Notice is opposed are as follows.

III. MATERIAL FACTS & PARTICULARS

A. The R-Max Perimeter Heat Shield Insulation System

8. Conventional hot tubs use full spray foam insulation. This spray foam insulation is applied directly to the inner shell of the hot tub. The pump is installed outside of the insulation, and as a result the radiant heat naturally produced from the pump cannot transfer through the insulation and there is significant energy (heat) loss.

9. In contrast, some of the tubs sold by Dynasty and #Co included a perimeter heat shield insulation system, which included insulation materials manufactured by R-Max. This insulation

system places R-Max insulation around the outer perimeter of the hot tub. The pump is installed between the insulation and the inner shell of the tub, such that heat loss from the pump is retained within the body of the tub, resulting in less energy loss, and other competitive advantages. Tubs with the perimeter heat shield insulation system are, therefore, more cost effective and energy efficient.

B. *No Representations That The Tubs Were Energy Star Approved*

10. Contrary to the allegations at paragraphs 1 and 2 of the Notice, at no point were representations ever made or authorized by the Respondents that the tubs themselves were Energy Star endorsed or Energy Star approved. All representations and advertizing authorized by the Respondents related strictly to the perimeter heat shield insulation that was manufactured by R-Max and supplied by R-Max for purchase with the logo printed on it.

11. The Respondents further deny that the presence of the logo on the insulation would reasonably convey the impression to the public that the entire tub was Energy Star approved. At all material times, the only impression that was reasonably conveyed to the public was that R-Max perimeter heat shield insulation system was more cost effective and energy efficient than conventional hot tub insulation – which it is.

C. *The Logo Was Printed On The Insulation By Its Manufacturer, R-Max*

12. Notwithstanding the allegations in the Notice, the fact is that the logo was printed on the insulation by its manufacturer, R-Max, not by the Respondents.

13. The insulation with the logo on it was, in turn, installed in the tubs by their manufacturer, not the Respondents.

14. The Respondents have no control over R-Max's labelling practices or the materials selected for use by the tubs' manufacturer. Furthermore, the Respondents reasonably relied on R-Max's labelling practices.

D. *The Promotional Materials Were Supplied By The Tubs' Manufacturer, Not The Respondents*

15. The Notice makes a number of allegations relating to the use and distribution of promotional materials. The fact is that the majority of these promotional materials were created by the tubs' manufacturer, not the Respondents.

16. The Respondents reasonably relied on the manufacturer's marketing materials.

E. *No Material Misrepresentations*

17. Most fundamentally, the Respondents deny that the logo and term "Energy Star" are, in and of themselves, material to customers. Rather, it is the energy efficient and cost effective nature of the product itself that is material to consumers.

18. In this regard, no consumers were materially misled. Dynasty's and #Co's customers understood that, and would have reasonably been under the general impression that, they were purchasing tubs that included a more cost effective and energy efficient insulation system – and, as explained above, that is exactly what they received.

19. In further support of this fact, the use of the logo had no material effect on Dynasty's and #Co's sales. Indeed, during the relevant time period, Dynasty's and #Co's sales decreased.

20. Furthermore, no customer was ever charged an additional amount to purchase the R-Max perimeter insulation; in all instances, it was provided as a complimentary upgrade free of charge.

F. *There Was Significant Confusion Surrounding The Use Of The Logo*

21. The Respondents further state that there was significant confusion surrounding the use of the logo on the insulation and in related promotional materials. From on or about October 2007 to on or about March 2009, Marsall engaged in discourse with the Cadmus Group, Inc. ("Cadmus"), a private corporation which represented to Marsall that it had been engaged by the EPA with respect to the logo. During the course of this discourse, Marsall was provided with conflicting information, which included, *inter alia*, that:

- (a) R-Max insulation was an Energy Star qualified product;

- (b) he could promote R-Max insulation as Energy Star qualified in his store and in his promotional materials so long as the tubs were not promoted as being Energy Star qualified;
- (c) the logo could also be used in conjunction with the sale of R-Max insulation separate from tubs;
- (d) the Cadmus group understood the Respondents “confusion” relating to the use of the logo;
- (e) that, as of March 2009, the issue had only been clarified by NRC;
- (f) that, as of March 2009, the EPA would soon be asking R-Max to stop labelling its insulation sold in Canada with the logo; and
- (g) the logo should be removed from EcoSmart’s website, which was done.

22. On the basis of the foregoing, and as a result of a lengthy dialogue with Cadmus, the Respondents honestly believed, and reasonably relied on the advice that:

- (a) R-Max insulation was an Energy Star qualified product;
- (b) Dynasty and #Co could display the logo in connection with:
 - (i) the insulation, so long as the tubs were not promoted as being Energy Star qualified; and
 - (ii) the sale of R-Max insulation separate from tubs, which Dynasty and #Co in fact sold.

23. At all material times, the Respondents acted reasonably in accordance with these beliefs.

G. *Representations by Sales Staff*

24. In specific response to paragraph 18(d) of the Notice, at all material times, sales staff (who were employed by Dynasty and #Co, not Marsall personally) were advised and trained regarding the energy efficiency qualities of the R-Max insulation system only. At no time were

sales staff trained, instructed or authorized to refer to the tubs themselves as Energy Star endorsed.

25. Further, in specific response to paragraph 18(d)(iv) of the Notice, at all material times, deliveries were performed by an independent contractor who was not authorized to make any representations on behalf of Dynasty and #Co regarding the tubs.

H. *No Basis for Personal Liability*

26. There is no legal or factual basis for attributing personal liability to Marsall for any of the alleged acts or omissions of Dynasty or #Co. (which are denied). At all materials times, Marsall was acting solely in his capacity as a director and officer of Dynasty and #Co. His status as a shareholder, director or officer of Dynasty and #Co. does not make him personally liable, as alleged at paragraphs 20(a) and (e) of the Notice.

27. Furthermore, Marsall specifically denies that he:

- (a) has any employees, as alleged at paragraph 20(c) of the Notice;
- (b) personally made representations that were false or misleading in any material respect, as alleged at paragraph 20(b) of the Notice;
- (c) was responsible for the dissemination of false or misleading representations, as alleged at paragraph 20(b) of the Notice; and
- (d) was personally responsible for the use of false or misleading promotional material by independent dealers, as alleged at paragraph 20(d) of the Notice.

28. Accordingly, the Commissioner has no genuine basis for proceeding against Marsall and he is not a proper party to this proceeding.

I. *No Aggravating Factors*

29. In specific reply to paragraphs 17, 23, 24 and 25, the Respondents deny that they were contacted by the EPA, Office of Energy Efficiency (“OEE”) and Bureau starting in 2007. The Respondents were never contacted by the EPA (except through Cadmus as described above) or OEE. Marsall received a telephone call from the Bureau in or about February 2009, regarding

the logo, wherein he requested further information and clarification from the Bureau so that he could review the matter with counsel, which the Bureau failed or refused to provide.

30. In specific reply to paragraph 26, the Respondents deny any improper advantage in the marketplace. To the extent consumers prefer the more cost effective and energy efficient properties of tubs with a perimeter heat shield insulation, this a legitimate competitive advantage, and not the result of any misrepresentations by the Respondents or otherwise. Moreover, similar sales campaigns were undertaken across Canada by other retailers and other hot tub manufacturers. Accordingly, the Respondents deny any improper competitive advantage.

31. In specific reply to paragraph 27, Marsall denies he has been personally previously involved in reviewable conduct under the Act. Marsall admits that his former business partner was implicated in unrelated reviewable conduct. This occurred at a time when Marsall was in the course of terminating his business relationship with this individual, in part due to this individual's business practices. Marsall may have signed a consent agreement, but only in his capacity as a director of Polar Spas, and at a time when he was terminating his involvement in Polar Spas. Marsall denies any personal involvement in the conduct, and states that guilt by association is not a valid aggravating factor.

32. Furthermore, the Respondents state that the following are mitigating factors:

- (a) there was significant confusion relating to the use of the logo;
- (b) indeed, it was not until on or about March 2009 that the EPA and NRC took steps to address this confusion with the insulation's manufacturer;
- (c) the Bureau contacted other retailers and offered them an opportunity to address this situation without the payment of an administrative monetary penalty. No such opportunity was provided to the Respondents;
- (d) no customer was ever charged an additional amount to purchase the R-Max perimeter insulation – in all instances, it was provided as a complimentary upgrade free of charge;
- (e) the use of the logo had no material effect on Dynasty's and #Co's sales;

- (f) the Respondents are small businesses; and
- (g) the conduct in question was confined to the geographic markets of Calgary and Red Deer.

IV. PROCEDURAL MATTERS

33. The Respondents request that this proceeding be conducted in the English language, and that it be heard in Calgary, Alberta.

WHEREFORE the Respondents, Brent Marsall, Dynasty Spas Inc. and 1232466 Alberta Ltd., request that the Notice of Application be dismissed with costs.

DATED at the City of Calgary, in the Province of Alberta, this 29th day of September, 2010.



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