

FILED / PRODUIT

Date: July 20, 2010

CT-2010-006

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

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 10(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*.

B E T W E E N:

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

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will apply to the Competition Tribunal ("**Tribunal**") pursuant to subsection 74.1(1) of the *Competition Act* ("**Act**") for a determination that the above-named Respondents ("**Respondents**") engaged in reviewable conduct contrary to

paragraph 74.01(1)(a) and subsection 74.03(3) of the Act, and for orders in relation to the Respondents, the particulars of which are set out in this Application.

AND TAKE NOTICE that in support of this Application, the Applicant will rely on the following Statement of Grounds and Material Facts.

STATEMENT OF GROUNDS AND MATERIAL FACTS

I. THE APPLICATION IN A NUTSHELL

1. From 2007 until 2009, the Respondents sold and distributed hot tubs bearing the ENERGY STAR mark and made representations associating these products with the ENERGY STAR program. The products were not ENERGY STAR rated – in Canada, hot tubs do not qualify for ENERGY STAR ratings, as they do not meet the program’s criteria of cost-effectiveness and energy efficiency. These misrepresentations conveyed to the buying public the impression that the hot tubs met the ENERGY STAR program’s criteria. This impression was likely to have influenced customers in deciding whether to buy the hot tubs in question. This case warrants the payment of significant administrative monetary penalties. Not only did the Respondents continue to make the representations despite having been put on notice that they were violating the Act and misusing the ENERGY STAR name and symbol, this is also not the first time that one of the Respondents has been implicated in acts of reviewable conduct under the Act; just one year prior, in 2006, Brent Marsall was a signatory to a Consent Agreement relating to other violations under Part VII.1 of the Act.

II. GROUNDS FOR APPLICATION

2. In connection with the promotion and sale of the products described below, the Respondents engaged in reviewable conduct, contrary to paragraph 74.01(1)(a) and subsection 74.03(3) of the Act. In particular, the Respondents, for the purpose of promoting, directly or indirectly, the supply or use of the Dynasty Spas brand of hot tubs and spas (“**Products**”), or their business interests, made representations to the public associating the Products with the ENERGY STAR name and symbol (“**Marks**”), and with the ENERGY STAR Program (“**Program**”). These representations were false or misleading in a material respect, in that the Products were not ENERGY STAR designated as per the terms of the Program. These representations were material to customers.

3. The Marks are owned by the Environmental Protection Agency (“**EPA**”), an agency of the United States Government. In Canada, the Marks are administered by the Office of Energy Efficiency (“**OEE**”), an office of Natural Resources Canada. The Program and Marks are administered with a view to, among other things, encouraging the public to buy and use energy-efficient, cost-effective products. The Marks are used on or in association with various energy-efficient products, so as to identify those products as ENERGY STAR-designated. The EPA and OEE authorize the use of the Marks by manufacturers, distributors and retailers of products that are eligible for such designation.

4. The EPA and OEE have not designated, and have never designated, the Products, or any constituent element of the Products for use in hot tubs or spas, as being ENERGY STAR-rated, qualified, certified, endorsed and/or associated with the Program. Pursuant to the terms of the Program, no hot tubs or spas qualify for the designation, as hot tubs

and spas do not meet the EPA and OEE's basic criteria of being goods that are cost-effective and energy-efficient.

III. MATERIAL FACTS

(A) The Parties

5. The Applicant is the Commissioner of Competition ("**Commissioner**"), appointed under section 7 of the Act.

6. The Respondent 1232466 Alberta Ltd. is a company incorporated under the laws of Alberta. "Dynasty Spas" is registered under the laws of Alberta as a trade name of 1232466 Alberta Ltd.

7. The Respondent Dynasty Spas Inc. is a company incorporated under the laws of Alberta. "EcoSmart Spas" is registered under the laws of Alberta as a trade name of Dynasty Spas Inc.

8. The Respondent Brent Marsall was at all material times one of the two Directors of 1232466 Alberta Ltd. and the sole Director of Dynasty Spas Inc. Mr. Marsall is also the registrant of the trade name "Dynasty Spas and Games Room", which is a registered trade name under the laws of Alberta.

9. The Respondent Rochelle Marsall was at all material times the other of the two Directors of 1232466 Alberta Ltd.

(B) The Products

10. The Respondents sell the Products, which they market under the names "Dynasty" and "EcoSmart", to the public at various retail locations, at their own retail stores, at roadside and parking lot "tent" sales, and at sales booths at home show events.

In addition to selling the Products at their own retail locations, at all material times, the Respondents acted as Canadian distributors for the Products, distributing the Products and ancillary promotional material to independent dealers at various locations across Canada.

11. The Products are spas and hot tubs suitable for home installation, and are often accompanied by a number of upgrade options, such as LED lighting systems, various media packages and jet propulsion packages. Depending on the model and selected features, the Products retail for between \$6,500 and \$20,000.

(C) The ENERGY STAR Marks and Program

12. The EPA initiated the Program in 1992 as a voluntary labelling initiative to identify energy-efficient consumer products. The Marks consist of a trademark registered by the EPA with the Canadian Intellectual Property Office (CIPO) in February 2001 (#TMA541652), being the words “ENERGY STAR”, and a certification mark consisting of a “shooting star” design registered with CIPO in November 2001 (#TMA553531). A copy of the Marks is reproduced as Appendix “A”.

13. The Marks are meant to symbolize energy efficiency, lower energy consumption, financial cost savings, and superior quality. Use of the Marks in Canada is authorized only in association with the Program, and only following an application process through which the OEE becomes satisfied that the goods qualify for ENERGY STAR designation. Parties applying to use the Marks must satisfy the OEE that the product for which designation is sought is, in fact, eligible for designation, and that the relevant product meets certain prescribed technical specifications.

14. In Canada, hot tubs and spas are not an enumerated category of eligible products, as the OEE does not consider these types of products to meet the cost-effective and improved energy efficiency principles of the Program. Thus, no hot tubs or spas are eligible for ENERGY STAR designation. Consequently, the Products are ineligible for ENERGY STAR designation and the Respondents are not permitted to use, or represent their Products in connection with, the Marks or the Program.

(D) Particulars of the Respondents' Misrepresentations

15. As part of a deceptive marketing scheme, the Respondents highlighted a type of insulation used in some of the Products. The insulation in question is marketed under the name "Rmax". In the United States, Rmax is ENERGY STAR-designated, but only for whole-wall application in new homes; it is not designated for use in hot tubs or spas. In Canada, Rmax is not ENERGY STAR-designated for any use, as the OEE does not certify any insulation products.

16. Despite the fact that Rmax is not ENERGY STAR-designated in Canada, the Respondents promoted the hot tubs that contained Rmax as having an ENERGY STAR-rated "Perimeter Heatshield Insulation System". The Respondents offered customers an option to upgrade to the "ENERGY STAR Insulation Package", which included Rmax insulation. The Respondents presented this upgrade as having a \$1,100 value.

17. Despite the fact that the Respondents were informed by the EPA, the OEE and the Competition Bureau that the Products were not ENERGY STAR-designated, they made false or misleading representations by using the Marks:

- a. on the Products;
- b. in association with Products, but not affixed thereon;

- c. in advertising and other media;
 - d. in representations by sales staff to customers, as well as to a Competition Bureau officer posing as a prospective customer for the purpose of investigating this matter; and
 - e. in promotional material sent to the Respondents' independent dealers.
18. Unless otherwise specified below, from at least 2007 until in or about April 2009, the Respondents engaged in deceptive marketing practices, the particulars of which are set forth below:

a. Representations on the Products:

- i. The Respondents prominently displayed the Marks and the text "*ENERGY STAR Home Sealing*" on the foil wrapping of the insulation at the bottom right corner of demonstration hot tubs that they had on display at their retail stores. The Respondents also supplied the same or similar demonstration hot tubs bearing the same Marks and statements to their independent dealers.
- ii. The Respondents used the Marks and the text "*Endorsed by ENERGY STAR[™]*", immediately followed by the text "*Saves ENERGY & MONEY!*", on a plastic-board poster attached to the demonstration hot tubs that they had on display at their retail stores. The poster also contained a cross-section illustration of the Products, highlighting the "Perimeter Heatshield Insulation System", and identified the insulation as being "endorsed by ENERGY STAR". The Respondents also supplied a similar poster to an independent dealer in Saskatoon.

b. Representations in association with Products, but not affixed thereon:

- i. The Respondents displayed the Marks on large banners, ranging in dimension from 2' x 3' to 6' x 4.5', where the Products were sold, including:
 - the Respondents' booth at the 2009 Calgary HomeExpo;
 - the Respondents' roadside tent sale off of Highway 1A outside of Calgary;
 - the Respondents' retail location at 6121 Centre St., Calgary; and
 - the Respondents' retail location at #2-6013 48 Ave., Red Deer.
- ii. The Respondents also supplied a similar banner to an independent dealer in Saskatoon.
- iii. In or around March 2008, the Respondents used the Marks on a laminated specification sheet that they provided to an independent dealer in Saskatoon, describing the alleged benefits of the Products.

c. Representations in advertising and other media:

- i. The Respondents used the Marks and accompanying text "*endorsed by ENERGY STAR*" in various nationally available on-line directories and locally available print business directories in Calgary and Red Deer, such as Yellow Pages and CanPages.
- ii. The Respondents placed the following statements on their EcoSmart Spas websites (www.ecosmartspas.ca and www.ecosmartspas.com): "*The EcoSmart™ Spa is the World's first and only spa using a Foil Backed Rigid insulation endorsed by ENERGY STAR®, providing tremendous*

money saving benefits” and “The EcoSmart™ Spa is the World's first and only spa using a Foil Backed Rigid insulation endorsed by ENERGY STAR®. R-max® rigid foil backed insulation has the highest r-value per inch of any spa available in the world exceeding up to 7 times the R-factor in other Spas”.

- iii. The Respondents used the Marks on their EcoSmart Spas websites in display diagrams showing a cross-section illustration of the Products, as described above in paragraph 20(a)(ii).
 - iv. The Respondents posted photos of the Products bearing the Marks on their EcoSmart Spas websites. These photos have remained on the websites to date.
 - v. The Respondents used the Marks in an advertisement for EcoSmart Spas.
- d. Representations by sales staff:**
- i. On or about November 19, 2008, a sales staff member at the Respondents’ retail location at 6121 Centre St. in Calgary told a Competition Bureau officer, posing as a prospective customer for the purpose of investigating this matter, that:
 - the Products have “*ENERGY STAR-rated insulation*”;
 - “*...all of our EcoSmart hot tubs are ENERGY STAR-efficient*”; and
 - in-store signage stating “*ENERGY STAR-endorsed*” meant that the Products were endorsed by “*ENERGY STAR Program testers*”.
 - ii. On or about November 20, 2008, a sales staff member at the Respondents’ retail location at #2-6013 48 Ave. in Red Deer told a Competition Bureau

Officer posing as a prospective customer for the purpose of investigating this matter that:

- the Products for sale in the store were “*the only ENERGY STAR hot tubs on the market*”;
- the Products in the store “*are the world’s most energy efficient hot tubs*”; and
- having “*the ENERGY STAR rating speaks volumes about the superiority of our product*”.

iii. On or about August 9, 2008, at the Respondents’ roadside tent sale, off of Highway 1A outside of Calgary, the Respondent Brent Marsall:

- told a customer that the Products have many features including high-efficiency insulation “*endorsed by ENERGY STAR*”; and
- wrote “*ENERGY STAR Insulation \$1100 INC*” on a customer’s sales agreement and informed the customer that the “upgrade” would be included at no extra cost.

iv. On or about January 30, 2009, a member of the Respondents’ Calgary staff told the aforementioned customer, upon delivery of a hot tub, that:

- Dynasty Spas is a “*registered*” *ENERGY STAR* company; and
- literature enclosed inside the protective wrapping of the new hot tub would better explain the hot tub’s association with the Program (no such literature existed after removing the protective wrapping).

e. Representations made to the Respondents’ dealers

i. The Respondents advised independent dealers that the Marks could be used in connection with the Products and, in particular, in connection with the insulation used in the Products;

- ii. The Respondents advised independent dealers of the supposed benefits of having an insulation system endorsed by the Program;
 - iii. The Respondents advised independent dealers that the Products were the only hot tubs in North America that had the “*ENERGY STAR-endorsed*” Perimeter Heatshield Insulation System; and
 - iv. The Respondents provided to independent dealers promotional material, such as the banners described in subparagraph 18(b)(i) above, the demonstration hot tubs described in subparagraph 18(a)(i) above, and the information posters described in subparagraph 18(a)(ii) above.
19. The Representations set forth above were material in that one or more of them affected customers’ decisions to purchase the Respondents’ hot tubs.
20. The Applicant pleads that the Respondent Brent Marsall’s personal liability must be found in the present matter for the following reasons:
- a. As set forth above in paragraph 8, Mr. Marsall was at all material times the legal registrant of the trade name Dynasty Spas & Games Room, was one of the two Directors of 1232466 Alberta Ltd., of which he was a voting shareholder, and was the sole Director of Dynasty Spas Inc.;
 - b. Mr. Marsall personally engaged in making the impugned public representations to independent dealers and customers, and was responsible for the dissemination of the impugned representations;
 - c. Mr. Marsall’s employees made the impugned representations to customers at the Respondent’s retail locations;

- d. Mr. Marsall provided promotional material displaying the impugned representations to independent dealers, and was responsible for the use of such promotional material at locations where the Products were sold;
 - e. Mr. Marsall had a direct interest in persuading customers to purchase the Products, considering his functions and personal interests as a shareholder in 1232466 Alberta Ltd.; and
 - f. Mr. Marsall knew or ought to have known that these representations were false or misleading in a material respect.
21. The Applicant pleads that the Respondent Rochelle Marsall's personal liability must be found in the present matter for the following reasons:
- a. As set forth above in paragraph 9, Ms. Marsall was at all material times the other of the two Directors of 1232466 Alberta Ltd., of which she was a voting shareholder;
 - b. Ms. Marsall personally engaged in making the impugned public representations to independent dealers and prospective customers, and was responsible for the dissemination of the impugned representations;
 - c. Ms. Marsall was responsible for the coordination of advertising material displaying the impugned representations, and in so doing, held herself out to be the owner of the Dynasty Spas Red Deer location;
 - d. Ms. Marsall provided promotional material displaying the impugned representations to independent dealers;

- e. Ms. Marsall had a direct interest in persuading customers to purchase the Products, considering her functions and personal interests as a shareholder in 1232466 Alberta Ltd.; and
- f. Ms. Marsall knew or ought to have known that these representations were false or misleading in a material respect.

IV. AGGRAVATING FACTORS

22. The Applicant submits that the following constitute aggravating factors that the Tribunal should take into account in determining the amount of the administrative monetary penalty that should be paid by the Respondents in accordance with subsection 74.1(5) of the Act.

23. On numerous occasions beginning in 2007, the EPA, the OEE and the Applicant informed the Respondents that Rmax insulation was ENERGY STAR-designated (a) only for use in residential whole-wall construction – not for use in a hot tub or spa, and (b) only in the United States.

24. In the above communications, the EPA, the OEE and the Applicant informed the Respondents that the Marks could not be used without proper approval, that the use of the Marks in reference to the insulation used in the Products was misleading, and that the Respondents must stop using the Marks and promoting the insulation and the Products as ENERGY STAR-designated. The United States manufacturers of the Products also advised the Respondents, in writing, to stop making ENERGY STAR-related representations in or around September 2008.

25. Despite the above warnings and notifications, the Respondents continued to use the Marks and make accompanying representations for 19 months from the time they were first notified, until ultimately ceasing to do so in April 2009.

26. The conduct described above provided the Respondents with an advantage in the marketplace over competitors not using such representations, as claims connected with cost savings, energy efficiency and the Program are material considerations to purchasers of spas and hot tubs. The Respondents portrayed their products as being the only hot tubs associated with the ENERGY STAR program.

27. A further aggravating fact is that this matter represents the second occasion that the Respondent Brent Marsall has been implicated in acts of reviewable conduct under the Act. In 2006, he was a signatory to a Consent Agreement in respect of another deceptive marketing scheme. There, the misrepresentations related to a cash rebate program that was allegedly being offered through a business called Polar Spas, of which Brent Marsall was an officer, director and/or manager. Despite acknowledging in that Consent Agreement that he was committed to complying with the Act, and the provisions in Part VII.1 of the Act specifically, Brent Marsall has engaged in the activity described above.

V. ORDER SOUGHT

28. The Applicant seeks the following:

- a. An order that the Respondents and any person acting on their behalf or for their benefit, including all directors, officers, employees, agents or assigns of the Respondents, or any other person or corporation acting on behalf of the Respondents or any successors thereof, shall, for a period of 10 years

from the date of such order, cease making, causing to be made, or permitting to be made, by any means whatsoever, false or misleading representations to the public for the purpose of promoting the use of the Products that explicitly or implicitly use or refer to the Marks or the Program in any form whatsoever;

- b. An order requiring the Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this Application, to:

Publish a notice or notices, in such manner and at such times as the Tribunal may specify, to bring to the attention of the class of persons likely to have been reached or affected by the Respondents' conduct, including, but not limited to, purchasers of the Products, distributors, agents or other persons who are engaged or have been engaged in the promotion, marketing, distribution or sale of the Products during the period that the Products have been marketed in Canada, (a) the names under which the Respondents carry on business, and, (b) the Tribunal's determination with respect to this Application. The notice or notices would include:

- a description of the reviewable conduct;
- the time period and geographic area to which the conduct related;
and
- a description of the manner in which any representation or advertisement was disseminated;

- c. An order that the Respondents pay an administrative monetary penalty or monetary penalties in an amount to be determined by the Tribunal upon hearing submissions from the Applicant;
- d. Costs; and
- e. Such further and other orders as to this Honourable Tribunal appear just.

VI. PROCEDURAL MATTERS

29. The Commissioner requests that this proceeding be conducted in the English language.

30. The Commissioner requests that this Application be heard in the City of Ottawa.

31. The address of the Respondents is:

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

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

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

Rochelle Marsall
c/o Dynasty Spas Red Deer
6013 48 Avenue
Red Deer, Alberta, T4N 3V5

DATED at Gatineau, QC, this 20th day of July, 2010.

“NIKIFOROS IATROU”

Nikiforos Iatrou

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& Commissioner of Competition

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APPENDIX “A”

Trademark: TMA541652

ENERGY STAR

Certification Mark: TMA553531



Commonly represented as:



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 10(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

Respondent

NOTICE OF APPLICATION

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