

Competition Tribunal Tribunal de la concurrence	
FILED / PRODUIT December 10, 2009 CT- 2009-019	
Chantal Fortin for / pour REGISTRAR / REGISTRAIRE	
OTTAWA, ONT.	# 001

CT-

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 commenced pursuant to subparagraph 10(1)(b)(ii) of the *Competition Act* into certain reviewable conduct;

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-

SLEEPWISE INC. (doing business as PREMIUM WHOLESale) and CHRISTIAN RYAN

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 paragraphs 74.01(1)(a) and 74.01(1)(b);

AND WHEREAS the Respondent, Sleepwise Inc. (doing business as Premium Wholesale), was incorporated under the laws of Ontario on the 13th day of February, 2007, under the corporation number 1457028, with the registered business name Premium Wholesale (business identification number 170174205) and the registered office address 206 Doon Mills Drive, Kitchener, ON, N2P 2R9;

AND WHEREAS the Respondent, Christian Ryan is the Director of Sleepwise Inc.;

AND WHEREAS the Commissioner has been informed that the ENERGY STAR Program, administered by Natural Resources Canada (“NRCan”) through the Office of Energy Efficiency (“OEE”), a Department of the Canadian Government, does not and has never recognized the

Spas or any other spas or hot tubs, or any constituent element thereof, including insulation, as being ENERGY STAR rated, qualified, certified, endorsed and/or associated with the ENERGY STAR Program in any form whatsoever;

AND WHEREAS on February 19, 2009, the Commissioner commenced an inquiry (the "Inquiry") pursuant to section 10 of the Act into certain alleged deceptive marketing practices of the Respondents and others, in connection with the Spas as aforesaid;

AND WHEREAS the Commissioner has concluded that:

- I. the Respondents, promoted and/or sold the Dynasty Spas brand of hot tubs and spas (the "Spas") and made representations to the public that created the general impression that the Spas and/or their insulation met the criteria (the "ENERGY STAR Program") and were eligible to use the ENERGY STAR trademark (no. TMA541652) and certification mark (no. TMA553531) registered with the Canadian Intellectual Property Office (CIPO) by the US Environmental Protection Agency on February 27, 2001 and November 7, 2001, respectively; ("the Marks");
- II. the Marks were used in representations made by the Respondents in, on, and in association with point-of-sale advertising materials, television advertising, Yellow Pages and other business directories (both online and in print), verbal representations both directly and by employees, sales persons and agents of the Respondents and in premises controlled by the Respondents (the "Representations");
- III. from March 2007 to February 10, 2009, the Respondents directly or indirectly made or caused to be made the Representations to the public for the purposes of promoting the Spas;
- IV. the Representations were false or misleading in a material respect and, thereby, the Respondents engaged in reviewable conduct contrary to paragraph 74.01(1)(a) of the Act; and
- V. the Respondents failed to ensure that the Spas were eligible for the Representations, or any other representation, about the Marks or the ENERGY STAR Program.

AND WHEREAS the Respondents do not admit but will not contest the Commissioner's conclusions for the purposes of the enforcement of any provision of this Consent Agreement (the "Agreement") or in any subsequent proceeding, including any proceeding under section 74.13 of the Act, in relation to this Agreement;

AND WHEREAS the Respondents have notified the Commissioner that, on being informed by the Commissioner of the Inquiry, they undertook corrective and compliance measures such as those set forth in Parts B and C below;

AND WHEREAS the Respondents informed the Commissioner that they were unaware that the Representations were false or misleading;

AND WHEREAS the Parties are satisfied that this matter can be resolved with the registration of this Agreement;

AND WHEREAS the Respondents are committed to comply with the Act generally, including the deceptive marketing practices provisions (Part VII.1) in particular, and the Commissioner recognizes it is financially efficient and in the public interest to obtain redress for the Respondents' reviewable conduct by entering into this Agreement;

AND WHEREAS the Commissioner and the Respondents agree that, upon the signing of this Agreement, the Parties shall file the Agreement with the Competition Tribunal (the "Tribunal") for immediate registration as an order thereof;

AND WHEREAS the Commissioner and the Respondents understand that, upon registration, pursuant to section 74.12 of the Act, this Agreement shall be enforceable as if it were an order rendered by the Tribunal;

NOW THEREFORE in order to resolve the Commissioner's Inquiry into certain alleged deceptive marketing practices of the Respondents, the Parties hereby agree as follows:

I. INTERPRETATIONS

1. For the purpose of the Agreement, the following definitions shall apply:
 - a. **"Affiliate"** shall have the meaning ascribed to it in the Act;
 - b. **"Agreement"** means this Consent Agreement entered into by the Respondents and the Commissioner of Competition including the preamble thereto;
 - c. **"Commissioner"** means the Commissioner of Competition, appointed pursuant to section 7 of the Act, and her/his authorised representatives;
 - d. **"Marks"** means the ENERGY STAR trademark (no. TMA541652) and certification mark (no. TMA553531) registered with the Canadian Intellectual Property Office (CIPO) by the US Environmental Protection Agency on February 27, 2001 and November 7, 2001, respectively;
 - e. **"Parties"** means the Commissioner of Competition and the Respondents;
 - f. **"Person"** means any individual, partnership, firm, corporation, association, trust, unincorporated organization or other entity;

- g. **“Related Person”** means the Respondents, their Affiliates, any present or future person under the control of the Respondents and their Affiliates;
- h. **“Respondents”** means Christian Ryan and Sleepwise Inc. as above described;
- i. **“Spas”** means the Dynasty Spas brand of hot tubs and spas manufactured by Dynasty Spas Inc. in Athens, Tennessee, and also marketed as EcoSmart Spas; and
- j. **“Tribunal”** means the Competition Tribunal established by the *Competition Tribunal Act Canada*, 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 of the Respondents, or who, in connection with the marketing or sale of the Spas, 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; and
 - b. the Commissioner.

A. NO FALSE OR MISLEADING STATEMENTS

- 3. In the marketing of products and services, the Respondents shall comply with the Misleading Advertising and 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 whatsoever in Canada, or available to consumers in Canada by any means whatsoever, 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 whatsoever in Canada, or available to consumers in Canada by any means whatsoever, 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 adequate and proper tests including, but not limited to, claims of energy efficiency, energy consumption, and/or costs of operation. When making such representations, the Respondents shall obtain proof of adequate and proper testing prior to making the representations. Copies of these tests shall be provided upon request to the Commissioner, within ten (10) days of her making such a request, by the Respondents in order to determine whether the tests are adequate and proper.

B. CORRECTIVE ACTIONS

6. The Respondents shall take the following corrective actions:
 - a. Remove and deliver up to the Commissioner all copies of the Marks, whether in actual use or application in the Representations or not, in the possession, control or power of the Respondents;
 - b. Take all necessary and expeditious steps to remove all advertising, copy, media or other forms of representation of the Marks with respect to the Spas, or at all, and shall provide to the Commissioner copies of any correspondence, diarized entries of efforts made and steps taken to remove such advertising, whether on the Internet or websites, in printed copy, advertising or other media;
 - c. Immediately provide written instructions to all sales persons, personnel and other employees, purchasers of, or persons supplied the Spas for resale, of the fact of this Agreement, and that any use of the Marks and the underlying ENERGY STAR Program in any way whatsoever is forbidden; and
 - d. Prominently display a corrective notice for twelve (12) weeks regarding the use of the Marks in all captive locations including, but not limited to, the home pages for any and all websites owned, operated or controlled by the Respondents that advertise, promote, or in any other way reference, hot tubs or spas. Such notice shall be sent to any purchaser of the Spas from March 2007 to the date this Agreement is registered; sent to any person supplied with Spas for resale during this time; and given to each future purchaser of a hot tub or spa that includes, or which the Respondents believe to include, insulation, or any other part or element, displaying the Marks.

- i. The notice (the "Notice") shall state the following:

I, Christian Ryan, own and operate stores that sell spas and hot tubs located in Kitchener, Ontario. The Commissioner of Competition has informed me that representations made through point-of-sale advertising materials, television advertising, Yellow Pages and other business directories (both online and in print), and verbal representations both directly and by store employees and agents have raised concerns under section 74.01 of the *Competition Act*. These concerns are related to representations that the *Dynasty Spas* and *EcoSmart Spas* product lines and/or their insulation are associated with the ENERGY STAR program. The Commissioner has alleged that these representations created the false or misleading general impression that these hot tubs and/or their insulation met the criteria and were therefore eligible to use the ENERGY STAR trademark and certification mark. Hot tubs, including their insulation, do not qualify for any form of ENERGY STAR consideration, certification, and/or endorsement.

We undertake to ensure that all future promotions contain accurate and relevant information and do not create a false or misleading general impression. This notice has been published pursuant to the Consent Agreement between the Commissioner of Competition and Christian Ryan and Sleepwise Inc. (doing business as Premium Wholesale), copies of which can be found at the Competition Tribunal's website (www.ct-tc.gc.ca).

C. COMPLIANCE

7. The Respondents shall implement a compliance program and conduct their business in a manner consistent with the Commissioner's *Information Bulletin on Corporate Compliance Programs* published on September 10, 2008 (available online at www.competitionbureau.gc.ca).
8. In the marketing of products and services, the Respondents shall conduct their business in a manner consistent with the new advertising guidelines published jointly by the Canadian Standards Association (CSA) 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 the data necessary to support the claim being made.”*
9. Thirty (30) days following the registration of this Agreement, the Respondents shall provide a written report to the Competition Bureau advising in detail the steps taken to ensure that they have complied and are complying with this Agreement including, but not limited to, the corrective actions outlined in section B (“Corrective Actions”).
10. Upon written request of the Deputy Commissioner of Competition, Fair Business Practices Branch, the Respondents shall submit a written report on thirty (30) days notice, with respect to any aspect of this Agreement.

D. AGREEMENT TO COOPERATE

11. The Respondents agree to the following:
- a. To act in good faith at all times when dealing with the Commissioner;
 - b. To provide complete, timely and ongoing cooperation with the Commissioner in connection with the Inquiry into the misuse of the Marks by other retailers, distributors and/or manufacturers of the Spas;
 - c. To provide disclosure and cooperation to the Commissioner in a timely manner, including but not limited to all non-privileged evidence, information and records in the Respondents’ possession or control, wherever located, that in any manner relates to the Inquiry; and

- d. To make himself and representatives, and/or any Related Person, available to the Commissioner upon reasonable notice and in a timely manner for interviews, depositions and other occasions to provide evidence under oath unless the Commissioner agrees otherwise.

E. FAILURE TO COMPLY

12. A failure to comply with the terms of this Agreement 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 remedies as the Tribunal may impose.

F. TERM OF AGREEMENT

13. Unless otherwise specified, this Agreement shall be binding on 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

14. Notices pursuant to the Agreement shall be given to the Parties at the following addresses or facsimile numbers:

(a) The Commissioner

Andrea Rosen
Deputy Commissioner of Competition
Fair Business Practices Branch, Competition Bureau
Place du Portage, Phase I, 50 Victoria Street
Gatineau (QC) K1A 0C9

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

With copies to:

Rhona Einbinder-Miller
Acting Director
Department of Justice
Competition Bureau Legal Services
Place du Portage, Phase I, 50 Victoria Street
Gatineau (QC) K1A 0C9

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

(b) The Respondents

Sleepwise Inc.
1425 Strasburg Rd.
Kitchener, Ontario, N2R 1H2

Christian Ryan
c/o 1425 Strasburg Rd.
Kitchener, Ontario, N2R 1H2

IV. GENERAL

15. The Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
16. The Agreement shall be governed by and interpreted in accordance with the laws of Canada applicable therein.
17. 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 or otherwise pursuant to section 74.13 of the Act, or with respect to any issue concerning the Agreement.

The undersigned hereby agree to the registration of this Agreement.

DATED at Kitchener, in the Province of Ontario, this 23rd day of November 2009.

[original signed by Christian Ryan]
Respondent, **Christian Ryan**

[original signed by Christian Ryan] c/s
Respondent, **Sleepwise Inc.**, per Christian Ryan, Director

DATED at Ottawa, in the Province of Ontario, this 8th day of December 2009.

[original signed by Andrea Rosen]
Andrea Rosen, Deputy Commissioner of Competition, Fair Business Practices Branch,
Competition Bureau