

FILED / PRODUIT
December 7, 2006
CT-2006-010

Chantal Fortin for / pour
REGISTRAR / REGISTRAIRE

OTTAWA, ONT.

0009

CT-2006-10

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) the *Competition Act* relating to the marketing practices of Imperial Brush Co. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

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-

**IMPERIAL BRUSH CO. LTD. AND KEL KEM LTD.
(c.o.b. AS IMPERIAL MANUFACTURING GROUP)**

Respondents

AFFIDAVIT OF ANNA PROESTAKIS

(Sworn December 7, 2006)

(Motion for Particulars and an Amended Response)

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(Applicant)

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2. Exhibit 1 – Notice of Application (filed September 11, 2006)
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Affidavit

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) the *Competition Act* relating to the marketing practices of Imperial Brush Co. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

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Respondents

AFFIDAVIT OF ANNA PROESTAKIS
(Sworn December 7, 2006)
(Motion for Particulars and an Amended Response)

I, ANNA PROESTAKIS, of the City of Ottawa, in the Province of Ontario, **MAKE OATH AND SAY:**

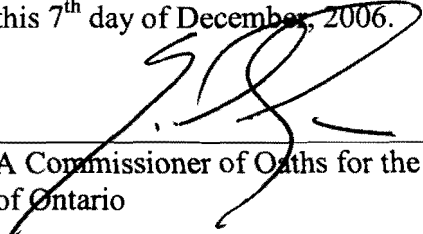
1. I am a paralegal employed by the Department of Justice, Canada, Competition Law Division. I have assisted counsel for the Commissioner of Competition and have been actively involved in this file since June 2006. Since that time, I have maintained the file, performed legal research, and attended meetings. I have personal knowledge of the matters set out in the notice of motion and I believe it and the following to be true.
2. The Commissioner of Competition filed a Notice of Application on September 11, 2006. Attached to this affidavit and marked as **Exhibit 1** is a certified true copy of this Notice of Application.

3. The Respondents served counsel for the Commissioner with a Response dated November 24, 2006. Attached to this affidavit and marked as **Exhibit 2** is a certified true copy of this Response.
4. I provide this affidavit for purposes of the Applicant's Motion for an Amended Response on behalf of the Commissioner of Competition and for no other purpose.



Anna Proestakis

SWORN before me
in the City of Ottawa
in the Province of Ontario
this 7th day of December, 2006.



A Commissioner of Oaths for the Province
of Ontario

Exhibit 1

THIS IS EXHIBIT 1 TO THE
AFFIDAVIT OF Anna Prestakis

SWORN BEFORE ME THIS 7th DAY
OF December, 2006


COMMISSIONER FOR OATHS

File No. CF 2006-010

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of
the *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd.
and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

AND IN THE MATTER OF an Application by the Commissioner of
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-and-

**IMPERIAL BRUSH CO. LTD. AND KEL KEM LTD.
(c.o.b. AS IMPERIAL MANUFACTURING GROUP)**

Respondents

COMPETITION TRIBUNAL TRIBUNAL DE LA CONCURRENCE	
FILED	SEP 11 2006
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	0001

NOTICE OF APPLICATION

TAKE NOTICE that the Applicant will make an Application to the Competition Tribunal (the "Tribunal") pursuant to subsection 74.1(1) of the *Competition Act* (the "Act") for a determination that the Respondents have engaged, and continue to engage, in reviewable conduct contrary to paragraph 74.01(1)(b) of the Act, and for an order in relation to the Respondents, the particulars of which are set out in paragraphs 20-25 of 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. GROUNDS FOR APPLICATION

1. The Applicant submits that in connection with the promotion and sale of the products described in paragraphs 4-9 of this Application, the Respondents have engaged, and continue to engage in reviewable conduct, contrary to paragraph 74.01(1)(b) of the Act. Specifically, the Respondents, for the purpose of promoting, directly or indirectly, the supply or use of the SUPERSWEEP Chimney Cleaning Log, the KEL KEM Chimney Creosote Cleaner, and the KEL KEM Creosote Conditioner (collectively the "Products"), and/or their business interests, have made and continue to make representations to the public in the form of statements regarding the performance or efficacy of the Products, which statements are not based on adequate and proper tests.

II. MATERIAL FACTS

(a) The Parties

2. The Applicant is the Commissioner of Competition, appointed under section 7 of the Act.
3. The Respondent Imperial Brush Co. Ltd., is a company incorporated in the province of New Brunswick. The Respondent Kel Kem Ltd. is a company incorporated in the province of Ontario. The Respondents are part of a group of companies which operate under the name Imperial Manufacturing Group.

(b) The Products

(i) SUPERSWEEP Chimney Cleaning Log

4. The SUPERSWEEP Chimney Cleaning Log (henceforth the “Log”) is a product shaped and packaged as a log, intended to be burned in fireplaces, wood stoves, and other similar wood burning appliances. Representations are made on the packaging of the Log, in the form of text and images, as to its performance and efficacy in chimney cleaning.
5. These representations include, but are not limited to, the following:
 - (a) Product name: Chimney Cleaning Log;
 - (b) Helps Prevent Chimney Fires;
 - (c) Helps Eliminate Dangerous Creosote In Your Chimney;
 - (d) Images on the packaging making the above representations or in support thereof.

(ii) KEL KEM Chimney Creosote Cleaner

6. The KEL KEM Chimney Creosote Cleaner (henceforth the “Cleaner”) is a liquid product sold in a one litre spray bottle. Representations are made on the packaging of the Cleaner as to its performance and efficacy in modifying creosote in chimneys.
7. These representations include, but are not limited to, the following:
 - (a) Product name: Chimney Creosote Cleaner;
 - (b) Reduces hard or glazed creosote to an ash;
 - (c) Non-corrosive;
 - (d) Non-combustible.

(iii) KEL KEM Creosote Conditioner

8. The KEL KEM Creosote Conditioner (henceforth the “Conditioner”) is a product, in powder form, sold in a 450 gram container. Representations are made on the packaging of the Conditioner as to its performance and efficacy in modifying creosote in chimneys.
9. These representations include, but are not limited to, the following:
 - (a) Product name: Creosote Conditioner;
 - (b) It can inhibit the rate of creosote buildup and reacts with most chimney deposits to reduce their adhesiveness;
 - (c) Non-corrosive;
 - (d) Non-toxic.

(c) Reviewable Conduct under paragraph 74.01(1)(b) of the Act

10. Paragraph 74.01(1)(b) reads as follows:

Misrepresentations to public

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,

[...]

(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...

(d) Form of Representations

11. The Respondents are responsible for the packaging, marketing and distribution of the Products, and have distributed them for sale or re-sale in various locations across Canada since the respective introduction of each Product. The representations made on the packaging of the Products have been consistent throughout the period the Products have been sold in Canada.
12. The Log was introduced into the Canadian market in or around July, 2003. The precise dates of introduction into the Canadian market of the Cleaner and Conditioner are unknown to the Applicant.
13. The representations include statements and/or guarantees as to the performance and/or efficacy of the Products as set out in paragraphs 4-9 of this Notice of Application.

(e) Testing

14. In December 2003, the Applicant, pursuant to her mandate to administer and enforce the Act, requested that the Respondents provide information to prove that statements made about the performance and/or efficacy of the Log were based on adequate and proper testing, as required by the Act.
15. In May 2004 the Applicant, pursuant to her mandate to administer and enforce the Act, requested that the Respondents provide information to prove that statements made about the performance and/or efficacy of the Cleaner and the Conditioner were based on adequate and proper testing, as required by the Act.
16. In response to each request, the Respondents provided certain documents which did not

satisfy the Applicant that what testing was done met the requirements of the Act.

17. Without attempting to limit in any way the general obligation of the Respondents to prove the adequacy and propriety of any test upon which statements regarding the performance and efficacy of the Products are based, the Applicant provides the following observations. With respect to the Log, documents provided by the Respondents suggest that limited testing was done before and after the product was released into the Canadian market. The testing done by the Respondents did not appear to establish reliable results as it lacked repetition and did not account for factors which could affect the performance of the Log.
18. With respect to the Cleaner and Conditioner, the testing done by the Respondents amounted to anecdotal information and did not account for factors which could affect the performance of the Cleaner and Conditioner.
19. The Applicant makes the foregoing statements after having had the benefit of reviewing all of the information provided and relied upon by the Respondents in substantiation of the statements, warranties or guarantees made with respect to the performance and/or efficacy of its Products. This information was provided at the Commissioner's request and with the assurance of confidentiality as required by ss. 10(3) and 29(1) of the Act.

III. Order Sought

The Applicant seeks the following:

20. 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

(hereinafter the foregoing persons are referred to as the "Respondents"), 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, representations to the public for the purpose of promoting the use of the products known as the Supersweep Chimney Cleaning Log, Kel Kem Chimney Creosote Cleaner and/or Kel Kem Creosote Conditioner or any similar product, in the form of a statement, warranty or guarantee of performance or efficacy of the products, made on the packaging of the products or elsewhere, unless or until the Respondents perform such adequate and proper tests as are necessary to substantiate such statements, warranties or guarantees. Without limiting the generality of the foregoing, such representations include representations regarding the Products', or any similar product's, capacity to:

- a. clean or assist in cleaning chimneys;
- b. reduce, remove, condition, or otherwise affect creosote;
- c. prevent, eliminate or otherwise affect chimney fires.
- d. help prevent chimney fires;
- e. help eliminate dangerous creosote in a chimney;
- f. reduce hard or glazed creosote to an ash;
- g. inhibit the rate of creosote build-up and react with most chimney deposits to reduce their adhesiveness.

21. And further, without limiting the generality of the foregoing, such representations include representations regarding the products' or any similar product's characteristics as:

- a. non-corrosive;
- b. non-combustible;
- c. non-toxic.

22. 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: the name under which the Respondents carry on business; and, the Tribunal's determination with respect to this Application. The notice or notices would include:
- a. a description of the reviewable conduct,
 - b. the time period and geographical area to which the conduct related, and
 - c. a description of the manner in which any representation or advertisement was disseminated.
23. An order that the Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this matter, provide a copy of that order to all 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 the Products have been marketed in Canada through to the date of the issuance of the Tribunal's order;
24. An order that Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this matter, withdraw all promotional materials which are in the possession of the Respondents' distributors, agents or other persons who are engaged or have been engaged in the promotion, marketing, distribution or sale of the products, including any units of the products;
25. 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; and,

26. Such further and other order as to this Honourable Tribunal seems just.

IV. Procedural Matters

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

28. The Commissioner requests the hearing of this application be heard in the City of Ottawa.

29. The address of the Respondents is: Imperial Brush Co. Ltd. and Kel Kem Ltd.
40 Industrial Park Street
Richibucto, NB E4W 4A4

DATED at Gatineau, Quebec, this 11th day of September, 2006.

“Lorne Ptack”

Lorne Ptack
Counsel for the Commissioner of Competition

Competition Law Division, Department of Justice
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50 Victoria Street
Gatineau, Quebec K1A 0C9

Telephone: (819) 956-6891
Facsimile: (819) 953-9267

File No.

THE COMPETITION TRIBUNAL

**IN THE MATTER OF THE
COMPETITION ACT, R.S., 1985, c. C-34;**

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group).

AND IN THE MATTER OF an Application by the Commissioner of Competition for an order pursuant to section 74.1 of the *Competition Act*.

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**THE COMMISSIONER OF
COMPETITION**

Applicant

-and-

**IMPERIAL BRUSH CO. LTD. AND KEL
KEM LTD. (c.o.b. AS IMPERIAL
MANUFACTURING GROUP)**

Respondent

NOTICE OF APPLICATION

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50 Victoria Street
Gatineau, Quebec K1A 0C9

Exhibit 2

File No. CT - 2006 - 010

The Competition Tribunal

In the matter of The *Competition Act*, R.S., 1985, c. C-34;

And in the matter of an inquiry pursuant to subsection 10(1)(b)(ii) of The *Competition Act* relating to the marketing practices of Imperial Brush Co. Ltd. and Kel Kem Ltd. (c.o.b. as Imperial Manufacturing Group)

Between:

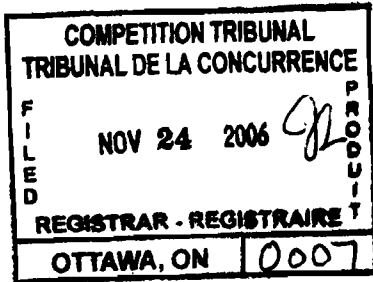
The Commissioner of Competition

Applicant

- and -

Imperial Brush Co. Ltd. and Kel Kem Ltd.
(c.o.b. as Imperial Manufacturing Group)

Respondents



Response of Imperial Brush Co. Ltd. and Kel Kem Ltd.

1. The Respondents file this Response to the Notice of Application of the Commissioner filed September 11, 2006 in accordance with the Tribunal's Order dated November 9, 2006 extending the time for serving and filing.
2. The Respondent, Imperial Brush Co. Ltd. ("Imperial Brush"), is incorporated under the laws of New Brunswick and has its head office and principal place of business at 40 Industrial Park Street, Richibucto, New Brunswick. It is principally engaged in the manufacturing and sale of brushes for sweeping of chimneys. It also sold the product known as the Supersweep™ Chimney Cleaning Log.
3. The Respondent, Kel Kem Ltd. ("Kel Kem"), is incorporated under the laws of Ontario and has its head office and principal place of business at 2430 Winston Park Drive,

THIS IS EXHIBIT.....²..... TO THE
 AFFIDAVIT OF..... Anna Proestakis.....
 SWORN BEFORE ME THIS.....^{7th}..... DAY
 OF..... December.....²⁰⁰⁶.....
 COMMISSIONER FOR OATHS

Oakville, Ontario. It manufactures and distributes the products identified as Kel Kem Chimney Creosote Cleaner and Kem Kem Creosote Conditioner.

4. While the companies are described as members of the Imperial Manufacturing Group, they carry on business independently. No partnership exists between them. Kel Kem is a wholly-owned subsidiary of Imperial brush.

The Products

SUPERSWEEP™ Chimney Cleaning Log

5. The SUPERSWEEP™ Chimney Cleaning Log (the "Supersweep Log") is no longer manufactured or distributed. Imperial Brush acknowledges that representations were made on the packaging of the Supersweep Log as follows:
 - (a) The name of the product -- Chimney Cleaning Log -- represented that the product, when used in accordance with instructions, performed a cleaning function in a chimney;
 - (b) When used in accordance with instructions, the Supersweep Log would help prevent chimney fires;
 - (c) When used in accordance with instructions, the Supersweep Log would help eliminate dangerous creosote.

Those representations are fair representations of the performance and efficacy of the product, and are based on adequate and proper tests.

6. The packaging of the Supersweep Log also included the following representations:

"The SUPERSWEEP™ Chimney Cleaning Log can be of benefit in a proper chimney-cleaning program. It is not intended as a substitute for inspection and cleaning by a properly qualified professional."

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7. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests.
8. The Supersweep Log consists of compressed hardwood sawdust and shavings, to which chemical substances have been added. The chemical substances are the active ingredients which perform the cleaning function. These substances can be – and are – used separately. The log is merely a delivery mechanism for the chemical substances. These substances have been in use for many years and their effectiveness has been described in technical literature.
9. The adequate and proper tests of the Supersweep Log referred to in the preceding paragraphs include:
 - (a) Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants; and
 - (b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.

Kel Kem Chimney Creosote Cleaner

10. Kel Kem Chimney Creosote Cleaner (“Creosote Cleaner”) is a liquid product. Kel Kem acknowledges that representations on the package are as follows:
 - (a) The product name, Chimney Creosote Cleaner, represents that the product, when used as instructed, has the effect of removing creosote from chimneys;
 - (b) The product has the effect of reducing the hard, glazed form of creosote, causing it to be burned and reduced to an ash;
 - (c) The product is non-corrosive, in that it does not cause corrosion of the stove or chimney;

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(d) The product is non-combustible, in that, when used as instructed (or when sprayed on an open fire), it does not ignite rather, the solvents evaporate and the manganese salt is carried by the hot flue gasses to the chimney where it reacts with the creosote.

Those representations are a fair representation of the performance and efficacy of the product, and are based on adequate and proper tests.

11. The packaging of Creosote Cleaner also included the following statement immediately following the statement that the product reduces creosote to ash:

“... reduces hard or glazed creosote to an ash when used as directed. For a clean, safe chimney, remove residue by brushing.”

and below that on the label:

“NOTE: Chimney Creosote Cleaner nor any other chemical can eliminate the need for a brushing. Professional brushing is required at least once a year, and more often under severe buildup conditions.”

12. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests.
13. The Creosote Cleaner consists of a solution of manganese salts in water and isopropyl alcohol. The manganese salts (specifically manganese nitrate) are the active ingredients which perform the cleaning function. The water and alcohol are merely a solvent to operate as a delivery mechanism for the manganese salts. Manganese has been in use for many years for this purpose and its effectiveness has been described in technical literature.

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14. The adequate and proper tests of the Creosote Cleaner referred to in the preceding paragraphs include:
- (a) Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants; and
 - (b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.

Kel Kem Creosote Conditioner

15. Kel Kem Creosote Conditioner is a powder product intended to be directly added to a fire.
16. Kel Kem acknowledges that representations made on the packaging of the Creosote Conditioner include:
- (a) The product name, Creosote Conditioner, indicating that it conditions, or has an impact on, creosote;
 - (b) The product can inhibit the rate of creosote build up;
 - (c) The product reacts with chimney deposits to reduce their adhesiveness (thus permitting them to be brushed out);
 - (d) The product is non-corrosive, in that it does not cause corrosion of the stove or chimney;
 - (e) The product is non-toxic, in that in use it does not release or cause the release of any substances which are hazardous to human or animal health.

Those representations are a fair representation of the performance and efficacy of the product, and are based on adequate and proper tests.

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17. The packaging of Creosote Conditioner also included the following statements (including the statement with respect to :
- “Imperial Kel Kem Chimney Conditioner aids chimney cleanliness when used regularly between professional brushings. It can inhibit the rate of creosote buildup and reacts with most chimney deposits to reduce their adhesiveness. Removal of creosote and deposits reduces the chance of a dangerous chimney fire. ...”
18. When taken together, the general impression conveyed by these representations are a fair description of the performance and efficacy of the product, and are based on adequate and proper tests.
19. The Creosote Conditioner consists of a mixture of TSP and Bentonite Clay. These interact with the creosote and convert the sticky, semi-liquid form to a brushable form. They also restrict the build-up of creosote in chimneys. These substances have been in use for many years for this purpose and their effectiveness has been described in technical literature.
20. The adequate and proper tests of the Creosote Conditioner referred to in the preceding paragraphs include:
- (a) Controlled tests performed by Imperial Brush under the supervision of independent engineers and consultants; and
 - (b) Experience of Imperial Brush, its consultants, and persons involved in the cleaning and maintenance of chimneys over many years.
21. These substances have been in use for many years and their effectiveness has been described in technical literature.
22. The respondents, Imperial Brush Co. Ltd. and Kel Kem Ltd., ask that the application be dismissed.


Due Diligence

23. The principal business of Imperial Brush is the manufacture and distribution of wire brushes for cleaning chimneys. In late 2002, Imperial Brush acquired Kel Kem, which was in the business of manufacturing and distributing chemical products for cleaning of wood-burning appliances and chimneys, including the Creosote Cleaner, the Creosote Conditioner, and the chemical substances which were the active ingredient in the Supersweep Log. In acquiring Kel Kem and in making the representations with respect to the performance and efficacy of the products, Imperial Brush and the new management of Kel Kem relied on the advice of Mr Abe Kelly, a founder and former owner of Kel Kem and a person with extensive knowledge and practical experience with respect to these products. The respondents Imperial Brush and Kel Kem have exercised due diligence to prevent reviewable conduct from occurring.

Procedural matters

24. The Respondents, Imperial Brush Co. Ltd. and Kel Kem Ltd. request that the proceeding be conducted in the English language.
25. The Respondents, Imperial Brush Co. Ltd and Kel Kem Ltd., request that the hearing of this application be held in the City of Moncton, New Brunswick.

Dated at Halifax, Nova Scotia, November 24, 2006.



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*Counsel for the respondents, Imperial Brush
Co. Ltd. and Kel Kem Ltd.*

THE COMPETITION TRIBUNAL

IN THE MATTER OF THE *COMPETITION ACT*, R.S., 1985, c. C-34, as amended;

AND IN THE MATTER OF an inquiry pursuant to subsection 10(1)(b)(ii) of the *Competition Act* relating to the marketing practices of Imperial Manufacturing Group (c.o.b. as Imperial Brush Co. Ltd., and Kel Kem Ltd.);

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B E T W E E N:

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AFFIDAVIT OF ANNA PROESTAKIS
(Sworn December 7, 2006)
(*Motion for Particulars and an Amended Response*)

Roger Nassrallah
Jim Marshall

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