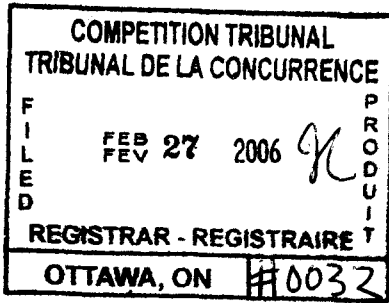


**THE COMPETITION TRIBUNAL**

**IN THE MATTER** of the *Competition Act*, R.S., 1985, c. C-34, as amended;

**AND IN THE MATTER** of the filing and registration of a Consent Agreement pursuant to section 74.12 of the *Competition Act*.

**BETWEEN:**

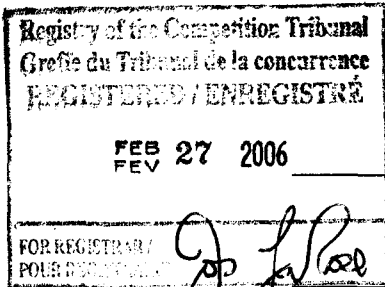


**THE COMMISSIONER OF COMPETITION**

**Applicant**

-and-

**DOUGLAS SCOTT MCNABB and FABUTAN CORPORATION**



**Respondents**

**CONSENT AGREEMENT**

**WHEREAS** the Commissioner of Competition (the "Commissioner") is head of the Competition Bureau and is responsible for the administration and enforcement of the *Competition Act* (the "Act") including the misleading advertising provisions of the Act (Part VII.1), which include the Misrepresentations to the Public provisions of the Act [74.01(1)];

**AND WHEREAS** Fabutan Corporation is a corporation that is incorporated pursuant to the Business Corporations Act, S.A. 1981, c. B-15 as amended, and operates 19 Corporate indoor tanning studios and has contracts with 131 Franchise Studios across Canada;

**AND WHEREAS** Douglas Scott McNabb is the President and a Director of Fabutan Studios Inc. and of The Dosco Group, a corporation that is the sole Shareholder of Fabutan Corporation;

**AND WHEREAS** the Commissioner commenced an inquiry on April 3, 2003, and subsequently commenced an application in the Competition Tribunal on March 31, 2005 against Fabutan Corporation and others in respect of certain alleged misleading advertising practices;

**AND WHEREAS** the Commissioner has discontinued this application against all of the respondents, other than Fabutan Corporation and Douglas McNabb;

**AND WHEREAS** Douglas Scott McNabb and Fabutan Corporation (hereinafter, collectively, "Fabutan") promote indoor tanning services and franchise opportunities to the public by way of the website [www.fabutan.com](http://www.fabutan.com);

**AND WHEREAS** in the promotion of indoor tanning services, Fabutan made certain representations on a web-page titled: "Benefits of Indoor Tanning", stating or implying, among other things:

- (a) that UV is the body's main source of vitamin D, that vitamin D has been linked to the prevention of breast, colon, prostate and ovarian cancer and vitamin D cannot be reliably supplemented in the diet;
- (b) that many types of cancer – including breast, colon, prostate and ovarian – are slowed or inhibited by increased exposure to sunlight;
- (c) that exposure to sunlight may have the effect of lowering blood pressure and heart rate;
- (d) that UV exposure is an effective treatment for Seasonal Affective Disorder;
- (e) that sunlight stimulates the thyroid gland, which boosts metabolism;
- (f) that UV exposure could decrease the risk of osteoporosis;
- (g) that indoor tanning reduces the risk of sunburn by 80%;
- (h) that moderate tanning has not been linked as a causative factor to any kind of permanent skin damage;

**AND WHEREAS** the Commissioner has reason to believe that Douglas Scott McNabb and Fabutan Corporation engaged in reviewable conduct within the meaning of paragraph 74.01(1)(a) ("false or misleading representations") and paragraph 74.01(1)(b) ("statements of performance not based on adequate and proper test");

**AND IT BEING UNDERSTOOD** that for the purposes of this Agreement, Fabutan, while not admitting any contravention of the Competition Act, does not contest the Commissioner's position;

**AND UPON CONSIDERING THAT** the Commissioner and Fabutan have reached an agreement which finally resolves, as of the date of implementation of this Consent Agreement (the "Agreement"), all of the Commissioner's concerns regarding the alleged deceptive marketing practices of Fabutan pursuant to 74.01(a) and (b) of the Act;

**AND WHEREAS** Fabutan is committed to compliance with the Act generally, and the misleading advertising provisions (Part VII.1) specifically;

**AND WHEREAS** the Commissioner and Fabutan agree that upon the signing of the Agreement, the Parties shall file the Agreement with the Competition Tribunal for immediate registration;

**AND WHEREAS** the Commissioner and Fabutan understand that upon registration, the Agreement shall be enforceable pursuant to section 74.12 of the Act;

1. The preamble forms part of the Agreement.

**THE COMMISSIONER AND FABUTAN CONSENT TO THE REGISTRATION BY THE COMPETITION TRIBUNAL OF AN AGREEMENT THAT:**

1. **NO FALSE OR MISLEADING REPRESENTATIONS**
2. Fabutan Corporation and any person acting on its behalf, including its directors, officers, employees or agents, shall, not make, cause to be made, or permit to be made, by any means whatsoever, any statements to the public for the purposes of promoting indoor tanning services that represent or convey a general impression that moderate tanning has been conclusively shown to provide proven health benefits unless those benefits have been:

- (a) demonstrated through randomized controlled trials and reported in one or more medical peer review or scientific journals or
- (b) endorsed by Health Canada as a health benefit which may be derived from UVB irradiance.

**II. NO STATEMENTS, WARRANTIES OR GUARANTEES WITHOUT ADEQUATE AND PROPER TESTS.**

3. Fabutan Corporation and any person acting on its behalf, including its directors, officers, employees or agents, shall, not make, cause to be made, or permit to be made, by any means whatsoever, any statements to the public for the purpose of promoting indoor tanning services whether by guarantee, warranty, or any other promise of performance or efficacy that moderate tanning has been conclusively shown to provide proven health benefits, including the prevention of cancer, heart or cardio vascular conditions, osteoporosis, seasonal affective disorder or stimulation of the metabolism, unless these statements have been:

- (a) demonstrated through randomized controlled trials and reported in one or more medical peer review or scientific journals or
- (b) endorsed by Health Canada as a health benefit which may be derived from UVB irradiance.

- 3A. Notwithstanding clauses 2 and 3 of this Consent Agreement, the Parties agree that Fabutan may make the following representations:

‘Vitamin D can be maintained or increased as a result of a tanning session in which the tanning equipment incorporates UB/V irradiance.’

- 3B. Notwithstanding clauses 2 and 3 of this agreement, emerging science may reveal that increased Vitamin D levels may be associated with a reduced risk of conditions other than those set forth in this consent agreement. At any time Fabutan may apply to the Commissioner pursuant to section 124.1 of the *Competition Act*, or its successor provisions, for a written opinion for guidance as to whether the proposed representations would constitute reviewable conduct under the Act.

### III. UNDERTAKING

4A. Fabutan undertakes to ensure that its representations to the public, including press releases, for the purpose of promoting indoor tanning services,

(a) concerning a relationship between exposure to UV-B, Vitamin D and any possible health benefits associated with Vitamin D, will include the following statement:

Tanning, whether by sunlight or sunbed, may cause pre-mature aging of the skin and skin cancer. Exposure to UV-B, whether by sunlight or by sunbed, produces Vitamin D in the body. However, mild exposure to UV-B is sufficient. Tanning is not required to generate Vitamin D. Vitamin D levels in the body may be maintained or increased by oral supplements without tanning. Increased Vitamin D levels have been associated in some studies with a reduced risk of such conditions as breast, colon, prostate and ovarian cancers, multiple sclerosis and diabetes. These associations have not been proven conclusively. Further information on Vitamin D and human health is available at Pubmed.com, the site of the United States National Institutes of Health.

(b) concerning sun protection, specify that:

A tan provides SPF protection in the range of 2-4. Health Canada recommends sunscreen with a minimum SPF of 15, when exposure to the sun is unavoidable.

4B. Fabutan undertakes to ensure that, where those representations are made in written form, the statements contained in sub-clauses 4A (a) and (b) shall be reproduced verbatim in close proximity to the representations and in the same type size.

4C. Fabutan undertakes to ensure that where those representations are made orally, the representor shall either speak the text of the statements contained in sub-clauses 4A (a) and (b) or summarize those statements orally and direct his or her audience to Fabutan's website for further information.

**IV. CORRECTIVE NOTICE**

5. Fabutan shall, within thirty (30) days from execution of this Agreement, post a corrective notice (“Notice”) on its website as set out in Appendix “A” in accordance with the terms and conditions set out in Appendix “B”. Fabutan shall provide the Commissioner with written confirmation that the notices were posted as provided for in this paragraph.

**V. DELIVERY OF CONSENT AGREEMENT**

6. Fabutan shall, within thirty (30) days from execution of this Agreement, provide a copy of this Agreement to all of its franchisees, agents or other persons who are engaged or have been engaged in the promotion, marketing or sale of Fabutan indoor tanning services since March 1, 2005. This does not apply to employees or franchisees terminated as of the date of this agreement.

**VI. WITHDRAWAL OF PROMOTIONAL MATERIALS**

7. Fabutan shall, within thirty (30) days from execution of this Agreement, withdraw all promotional materials containing the representations and warranties referred to in paragraphs 2 and 3 above that are in the possession of Fabutan’s distributors, agents or other persons who are engaged or have been engaged in the promotion, marketing, distribution or sale of Fabutan’s business opportunities for franchising and/or indoor tanning services.

**VII. CORPORATE COMPLIANCE PROGRAM**

8. Fabutan will establish, implement and maintain a formal Corporate Compliance Program regarding the use and content of advertisements and other promotions (the “Compliance Program”). The goal of the Compliance Program will be to promote compliance with the Act generally, and the deceptive marketing practices provisions of the Act (Part VII.1) specifically. The Compliance Program will be framed and implemented in a manner consistent with the Commissioner’s Information Bulletin on “Corporate Compliance Programs”. A draft of the Compliance Program and Compliance Policy will be submitted to the Commissioner within forty-five (45) days from the execution of this Agreement.

9. The Compliance Program will include the following features:
- (a) designation of a corporate compliance officer within thirty (30) days of the execution of this Agreement;
  - (b) the development of a written corporate compliance policy with respect to advertising (“Compliance Policy”);
  - (c) the distribution of the Compliance Policy to all current and future corporate officers, directors, senior management and other employees who are materially involved in the formulation and/or implementation of marketing, advertising and sales of products;
  - (d) initial training sessions to ensure the full comprehension of the Compliance Program and Compliance Policy by the personnel described in subparagraph (iii);
  - (e) written acknowledgement of the personnel described in subparagraph (iii) of their awareness and comprehension of, and agreement with the Compliance Program and Policy; and
  - (f) upon written request of the Deputy Commissioner of Competition, Fair Business Practices Branch, copies of records regarding the implementation and maintenance of the Compliance Program and Compliance Policy will be provided to the Competition Bureau, within thirty (30) days.

**IX. NOTICES**

10. Notices pursuant to the Agreement shall be given to the parties at the following addresses or facsimile numbers:
- (a) The Commissioner:  
Sheridan Scott  
Commissioner of Competition  
Competition Bureau  
Place du Portage, Phase 1  
50 Victoria Street  
Gatineau, Quebec K1A 0C9

Telephone: 819-997-3301  
Facsimile: 819-953-5013

With a copy to:

J. Sanderson Graham  
Counsel for the Commissioner  
234 Wellington Street  
East Tower, Room 1252  
Ottawa, Ontario K1A 0H8

Telephone: 613-952-7898  
Facsimile: 613-954-1920

(b) Fabutan

Douglas Scott McNabb  
Fabutan Corporation  
5925 – 3rd Street SE  
Calgary, Alberta T2H 1K3

Telephone: 403-640-2100  
Facsimile: 403-640-2116

With a copy to:

Graham Price, Q.C.  
Suite 210 – 1010 – 8th Avenue SW  
Calgary, Alberta T2P 1J2

Telephone: 403-262-8616  
Facsimile: 403-233-0878



**X. ADMINISTRATIVE MONETARY PENALTY**

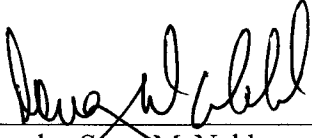
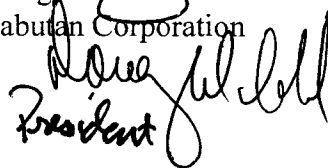
11. Fabutan Corporation shall forthwith pay an administrative monetary penalty in the amount of sixty-two thousand and five hundred dollars (\$62,500.00) and Douglas Scott McNabb shall make a donation of twelve thousand and five hundred dollars (\$12,500.00) to the Direct MS Charity of Alberta.

**XI. GENERAL**

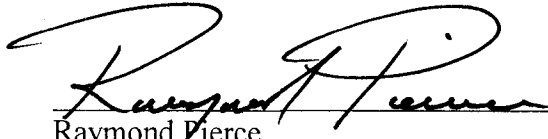
12. The Agreement may be executed in two or more counterparts, each of which shall be an original instrument, but all of which shall constitute one and the same Agreement.
13. The Agreement shall be governed by an interpreted in accordance with the laws of the Province of Alberta and the federal laws of Canada applicable therein.
14. This Agreement shall be binding on Fabutan, any of its affiliates and any present or future person under its control or under the control of its affiliates, and shall remain in force for a period of ten (10) years from the date of its registration.
15. For greater certainty, the Tribunal shall retain jurisdiction for the purpose of any application by the Commissioner or Fabutan 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.
16. For the purpose of determining or securing compliance with the Agreement, the Commissioner shall allow Fabutan three (3) weeks in which to clarify any objections raised by the Commissioner with regard to compliance with the Agreement prior to the commencement of proceedings by the Commissioner.
17. A failure to comply with the terms of this Agreement by Fabutan, any of its affiliates and any present or future person under its control or under the control of its affiliates, shall be deemed to be a breach of this Agreement by Fabutan.

18. In the event of a dispute as to the interpretation or application of the Agreement, any Party shall be at liberty to apply to the Tribunal for an order interpreting any of the provisions of the Agreement.

DATED at Calgary, in the Province of Alberta, this 16 day of  
JANUARY, 2006.

  
\_\_\_\_\_  
Douglas Scott McNabb  
Fabutan Corporation  
  
President

DATED at Gatineau, in the Province of Quebec, this 14<sup>th</sup> day of  
February, 2006

  
\_\_\_\_\_  
Raymond Pierce  
Deputy Commissioner of Competition  
Competition Bureau  
Fair Business Practices Branch

## Appendix “A”

The Commissioner of Competition has brought to our attention concerns about representations made on the Fabutan web-site [www.fabutan.com](http://www.fabutan.com) and in other promotional materials, relating to purported health benefits of indoor tanning. The Commissioner’s position is set out at [www.cb-bc.gc.ca/](http://www.cb-bc.gc.ca/) > News and Resources. Fabutan.

While Fabutan has always urged its clients to avoid sunburn and counselled persons with certain skin types to avoid tanning, in response to the Commissioner’s concerns, Fabutan has undertaken to ensure that any messages to the public concerning any relationship between exposure to UV-B and possible health benefits associated with vitamin D are framed within the following context:

Tanning, whether by sunlight or sunbed, may cause premature aging of the skin and skin cancer. Exposure to UV-B, whether by sunlight or by sunbed, produces Vitamin D in the body. However, mild exposure to UV-B is sufficient. Tanning is not required to generate Vitamin D. Vitamin D levels in the body may be maintained or increased by oral supplements without tanning. Increased Vitamin D levels have been associated in some studies with a reduced risk of such conditions as breast, colon, prostate and ovarian cancers, multiple sclerosis and diabetes. These associations have not been proven conclusively. Further information on Vitamin D and human health is available at Pubmed.com, the site of the United States National Institutes of Health.

Additionally Fabutan acknowledges that UV-B exposure does not stimulate the thyroid.

## **Appendix “B”**

The text of the notice contained in Appendix “A” shall be posted on [www.fabutan.com](http://www.fabutan.com) for one hundred and twenty (120) days from the date of the registration of the Agreement. The words “NOTICE - COMMISSIONER OF COMPETITION and FABUTAN “ shall appear on the home page in the ‘NEWS’ found on the left hand side of the Home page and shall be linked to the text of the message in Appendix “A”. For the first ninety (90) days these words will be the first news item; for the remaining thirty (30) days these words will be visible in the news box as the second item.