

File No. CT-2005-003

**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 The Dosco Group Inc., Fabutan Corporation, Fabutan Studios and Douglas Scott McNabb, President, carrying on business as Fabutan Sun Tan Studios;

**AND IN THE MATTER OF** an Application by the Commissioner of Competition for an order pursuant to Section 74.01 of the *Competition Act*.

**B E T W E E N:**

**THE COMMISSIONER OF COMPETITION**

Applicant

-and-

**The Dosco Group Inc., Fabutan Corporation, Fabutan Studios  
and Douglas Scott McNabb, President  
carrying on business as Fabutan Sun Tan Studios;**

Respondents

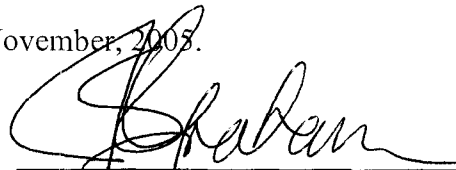
**Submissions of the Applicant Respecting Service of Experts' Affidavits**

1. By letter dated 4 November 2005, Doug McNabb, President of Fabutan Corporation, raises several issues concerning service of the Applicant's affidavits. Essentially, he complains that the affidavits were late and incomplete.
2. By Scheduling Order made on 3 August 2005, the Tribunal established a schedule for completion of various pre-hearing procedures. The Order reflected a schedule agreed upon by the parties. It called for service of experts' affidavits on Tuesday, 1 November 2005.

3. Due to unforeseen administrative problems, the Applicant was not able to serve its experts' affidavits on the Respondents' counsel until the following day, 2 November 2005. The affidavits were sent to the Respondents' counsel on 1 November by overnight courier.
4. The problems concerned pages missing from the affidavit of Dr. Jason Rivers. Dr. Rivers swore his affidavit in Vancouver on 18 October 2005. The affidavit was then sent to Ottawa for review by counsel. On review, counsel discovered that some pages of the exhibits attached to the affidavits were out of sequence or missing. Counsel contacted the regional office of the Competition Bureau in Vancouver to obtain copies but these could not be sent by the end of the business day on 1 November. Rather than delay service of the entire affidavits, counsel elected to serve the affidavits and then serve the missing pages as soon as we obtained them. These were sent to counsel for the Respondents on 3 November 2005.
5. To summarize, the Applicant served its affidavits on 2 November 2005, one day after the time specified in the Scheduling Order. Two of the affidavits were complete. Several pages from the exhibits attached the affidavit of Dr. Rivers were missing but were served on 3 November 2005.
6. The Applicant respectfully requests an order extending time for service of its affidavits. The delay, while regrettable, is minimal and does not cause an injustice.
7. The Respondent is not prejudiced by a delay of one day. The Applicant sent draft versions of the affidavits to the Respondent on 22 September. From that date, the Respondents knew the expert evidence the Applicant intended to lead. Any suggestion that its experts might be unable to consider the affidavits and prepare reply affidavits is untenable in the face of this early disclosure. The Respondents still have plenty of time to prepare reply affidavits before the due date of 15 December 2005.

8. Many of the exhibits attached to Dr. Rivers' affidavit were abstracts of scientific journal articles rather than complete articles. Those exhibits were properly sworn. The Applicant has, as a courtesy, attempted to locate the full text of these articles, many of which are quite old. The Applicant wishes to rely on the full text and will enter these into evidence at the hearing. The Respondents are not prejudiced by their early production at this date.
9. Finally, in forwarding the missing pages of the exhibits to the Respondents, the Applicant is not in any way attempting to amend the affidavit of Dr. Rivers. Rather, it is simply providing pages that were inadvertently omitted from the copy served on the Respondents.
10. The Applicant respectfully submits that the Applicant has made best efforts to comply with the scheduling order in the circumstances and this complaint should be dismissed.

Dated at Ottawa, Ontario, this 23<sup>rd</sup> day of November, 2005.



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