

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

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
FILED	PRODUIIT
MAR 31 2005	
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:

False or Misleading Representations

1. 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 any or all of the Respondents (hereinafter the foregoing persons are collectively 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, false or misleading representations to the public for the purposes of promoting indoor tanning services and, without limiting the generality of the foregoing, the Respondents, or any of them, shall cease making, causing to be made, or permitting to be made by any means whatsoever, representations to the public that convey a false or misleading general impression as to the risks and benefits of exposure to UV radiation emitted by tanning lamps, and the risks and benefits of “moderate tanning”¹ by using tanning lamps. In particular, the Respondents shall cease making the following representations:

- (a) that moderate tanning is necessary to achieve or maintain adequate levels of vitamin D in the body or that moderate tanning is a safe and reliable way to stimulate the production of Vitamin D in the body;
- (b) that levels of Vitamin D sufficient to promote health cannot be effectively maintained through normal exposure to sunlight or by augmenting the diet with vitamin supplements;
- (c) that moderate tanning has been conclusively shown to be associated with
 - i) prevention or reduced risk of breast, colon, prostate and ovarian cancers;
 - ii) prevention or reduced risk of heart or cardiovascular disease;
 - iii) effective treatment of seasonal affective disorder;
 - iv) stimulation of the thyroid gland, resulting in an increase or boost to the metabolism;
 - v) prevention or reduced risk of osteoporosis;

¹ “Moderate tanning” - defined as gradual exposure to UV radiation sufficient to result in a change in pigmentation of the skin but less than less than that which would result in sunburn.

- vi) significantly reduced risk of sunburn from exposure to sunlight;
- (d) that moderate tanning is not associated with significant risk of permanent skin damage, wrinkling or photo-aging of the skin, or skin cancer.

Statements, Warranties or Guarantees

2. An order that the Respondents or any of them, 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, any representations to the public for the purpose of promoting indoor tanning services in the form of a statement, warranty or guarantee of the performance or efficacy of indoor tanning services, unless and 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 conveying the impression that the use of indoor tanning devices for moderate tanning is:
 - (a) an effective, safe and reliable way of correcting Vitamin D deficiency;
 - (b) an effective way of preventing or reducing the risk of breast, colon, prostate and ovarian cancers;
 - (c) an effective way of preventing or reducing the risk of heart or cardiovascular disease;
 - (d) an effective way of treating seasonal affective disorder;
 - (e) an effective way of increasing or boosting the metabolism through stimulation of the thyroid gland;
 - (f) an effective way of preventing or reducing the risk of osteoporosis;

- (g) an effective way of significantly reducing risk of sunburn from exposure to sunlight.
3. 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 the following information to the attention of the class of persons likely to have been reached or affected by the Respondents' conduct:
 - (a) the name under which the Respondents carry on business;
 - (b) the Tribunal's determination with respect to this application;
 - (c) a description of the reviewable conduct, specifically the making of false or misleading representations conveying the impression that engaging in moderate tanning by using tanning lamps has been shown to be beneficial to health and is not associated with skin damage, premature aging of the skin and skin cancer;
 - (d) the time period and geographical area to which the conduct related, and
 - (e) a description of the manner in which any relevant representation or advertisement was disseminated.
 4. 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 franchisees, agents or other persons who are engaged or have been engaged in the promotion, marketing or sale of Fabutan indoor tanning services during the period from January 1, 2004 through the date of the issuance of the Tribunal's order;
 5. An order that the Respondents, within 30 days of the issuance of any order the Tribunal makes in connection with this matter, withdraw all promotional materials containing the representations and warranties referred to in paragraphs 1 and 2 above that 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 Respondents' business opportunities for franchising and/or indoor tanning services;

6. An order that the Respondents pay an administrative monetary penalty or monetary penalties as the court may specify; and
7. Such further and other order as to this Honourable Tribunal seems just.

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

8. The Applicant states that in connection with the promotion of indoor tanning services through their franchise network to the public, the Respondents have engaged in and continue to engage in reviewable conduct, contrary to paragraph 74.01(1)(a) of the *Act*. Specifically, the Respondents, for the purposes of promoting a business interest generally, and promoting the use of indoor tanning services in particular, have made and continue to make representations to the public that are false or misleading in a material respect and which create a false or misleading general impression regarding the health benefits and risks associated with indoor tanning. Those representations include the statements set out in paragraph 1 of this Application.
9. The Applicant further states that in connection with the promotion of indoor tanning services through their franchise network to the public, the Respondents have engaged in and continue to engage in reviewable conduct contrary to paragraph 74.01(1)(b) of the *Act*. Specifically, the Respondents have, for the purposes of promoting a business interest generally, and promoting the use of indoor tanning services in particular, made and continue to make representations to the public in the form of statements regarding the

performance and efficacy of the use of indoor tanning services for moderate tanning, which statements are not based on adequate and proper tests. These statements include the statements set out in paragraph 2 of this Application.

II. MATERIAL FACTS

Introduction

(A) The Parties

10. The Applicant is the Commissioner of Competition, appointed under section 7 of the *Act*.
11. The Respondent, Douglas Scott McNabb, is the director, president and principal shareholder of The Dosco Group Inc., Fabutan Corporation and Fabutan Studios Inc. The Dosco Group Inc. holds shares in Fabutan Corporation and Fabutan Studios Inc. The head office or registered office address of all three companies is 5925 3rd Street SE Calgary, AB Canada T2H 1K3. On their website www.fabutan.com, the Respondents promote indoor tanning services and offer opportunities to invest in franchise businesses operating under the name Fabutan Sun Tan Studios. According to information posted on the Fabutan Sun Tan Studios website, there are 150 Corporate Studios and 131 Franchise Studios in operation. Certified Copies of records held by the Registrar of Corporations for the Province of Alberta and the Registrar of Companies for the Province of British Columbia contain the following information:
 - (a) The Dosco Group Inc. was first incorporated in the Province of Alberta on July 30, 1986, as 351933 Alberta Limited;
 - (b) On October 8, 1987, the company name was changed to D & G Flooring Limited. Douglas Scott McNabb was named as the sole director and president of the corporation;
 - (c) On March 30, 1990, the name of the company was changed from D & G Flooring Limited to The Dosco Group Inc.;

- (d) The Dosco Group Inc.'s Annual Return dated 1998/07/08 lists both Elizabeth Gail McNabb and Douglas Scott McNabb as active shareholders, each with 50 percent of voting shares. Douglas Scott McNabb is listed as director;
- (e) The Dosco Group Inc.'s Annual Return dated 1999/07/23 lists Douglas Scott McNabb as director, and lists Elizabeth Gail McNabb as "inactive" shareholder but shows her with 50 (sic) percent of voting shares. Douglas Scott McNabb is listed as an active shareholder and is shown as having 100 percent of voting shares;
- (f) The Dosco Group Inc.'s Annual Return dated 2000/07/21 lists Douglas Scott McNabb as director and active shareholder with 100 percent of voting shares;
- (g) The Dosco Group Inc.'s Annual Returns for 2001, 2002, and 2003 list Elizabeth Gail McNabb as and active shareholder with 2 percent of voting shares. Douglas Scott McNabb is listed as director and active shareholder with 98 percent of voting shares;
- (h) The Dosco Group Inc.'s Annual Return dated 2004/08/23 lists Elizabeth Gail McNabb as an "inactive" shareholder but show her as having 2 (sic) percent of voting shares. Douglas Scott McNabb is listed as director and active shareholder with 100 percent of voting shares;
- (i) A search of the Alberta Corporate Registration System on December 12, 2004, for The Dosco Group Inc., showed Douglas Scott McNabb as Director and both Elizabeth Gail McNabb and Douglas Scott McNabb as voting shareholders, with 2 per and 98 percent of voting shares, respectively. The Dosco Group Inc. was shown as holding shares in *inter alia* Fabutan Corporation and Fabutan Studios Inc.;
- (j) Fabutan Corporation was incorporated in Alberta on November 20, 1991 as 510933 Alberta Ltd. The name was changed to Fabutan Corporation on October 30, 2001. Douglas S. McNabb is President and Owner. 510933 Alberta Ltd. was

registered as an extraprovincial corporation in British Columbia on May 3, 2000 and the name change to Fabutan Corporation was registered on September 19, 2002; and

- (k) Fabutan Studios Inc. was incorporated in Alberta on August 2, 2001 and was registered as an extraprovincial company in British Columbia on September 28, 2001. Douglas Scott McNabb is listed as Director, President and Secretary-Treasurer.

(B) What is the tanning process?

12. According to Health Canada²:

“Skin is made up of basically two layers, the epidermis (outer layer) and the dermis (inner layer). The innermost section or dermis is formed of tissues containing nerves, blood vessels, lymphatics and fatty tissue. The outer layer or epidermis is made up of a series of layers. Cells are created in the bottom or innermost layer of the epidermis. As cells age, they travel from the innermost layer of the epidermis to the outer surface of the skin where they die. This surface layer (or stratum corneum) forms a tough outer protective covering. As the cells move outward, they lose moisture, flatten and eventually flake off the surface of the skin. This process takes about 28 days.

Tanning

There are two effects that occur in the skin following exposure to UV radiation. When the skin is exposed to ultraviolet radiation, a slight immediate pigment darkening is sometimes observable, it is called immediate tanning. This results from darkening of the melanin pigment that is already present in the epidermis as it absorbs some of the UVA radiation. This tan is only temporary, and fades within 3 to 36 hours after exposure.

A second process known as “delayed tanning” occurs in some individuals, not in every white individual, when the skin is exposed to UVB radiation. This process causes two responses. First, more melanocytes (skin cells capable of producing melanin pigment) are produced at the base of the epidermis, and each melanocyte produces more melanosomes containing

²GUIDELINES FOR TANNING SALON OWNERS, OPERATORS AND USERS
at <http://www.hc-sc.gc.ca/hecs-sesc/ccrpb/publication/02hecs288/appendix1.htm>

the melanin pigment. These melanin containing units begin to distribute themselves throughout the layers of the skin, as they work their way toward the keratinocytes at the surface of the skin. This greater presence of melanin-containing cells causes the skin to appear darker in colour. Second, the tough outer or surface layer of dying skin cells thickens and absorbs more of the hazardous shortwave UVB radiation. This second, two-part process takes one or more days to happen, and produces a noticeable tan within a few days that can last for weeks or even months.”

13. Health Canada’s Radiation Protection Bureau regulates the design, manufacture and operation of sunlamps under the Sunlamps Regulation enacted pursuant to the *Radiation Emitting Devices Act*. Health Canada lists the risks of tanning as sunburn, premature aging, skin cancer and eye problems.³ In a consumer information publication “Tanning Under Lights”,⁴ Health Canada advises: “If you think going to a tanning salon is a safe way to tan, think again! By learning the facts about tanning now, you can protect yourself from skin cancer later in life. **There is no safe way to tan.** A tan from the sun’s rays or under lights in a tanning salon will damage your skin.”

(C) Reviewable Conduct

Form of Representations

14. Representations were made to the public by means of the Respondents’ website on the Internet (www.fabutan.com), and printed promotional materials available at the Respondents’ service counters.

Reviewable Conduct under paragraph 74.01(a) of the Act

15. Subsection 74.01(1) of the *Act* provides as follows:

“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

³<http://www.hc-sc.gc.ca/hecs-sesc/ccrpb/publication/02hecs288/chapter2.htm>

⁴<http://www.hc-sc.gc.ca/hecs-sesc/ccrpb/00ehd240.htm>

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.”

16. The false and/or misleading representations made by the Respondents during the Relevant Period regarding the health benefits and risks of indoor tanning include the following:

(a) that moderate tanning is necessary for stimulation of the production of Vitamin D in the body or that moderate tanning is a safe, reliable way to stimulate the production of Vitamin D in the body, and that deficiency in Vitamin D cannot be effectively corrected by dietary supplements:

[from www.fabutan.com Benefits of Indoor Tanning:

“Your Source for Vitamin D

UV-B rays are the main source of Vitamin D for our bodies, which helps to promote healthy bones and the absorption of calcium and phosphorous in the body. Sunlight is the body’s only natural and reliable source of Vitamin D. Studies suggest that this vitamin - linked to the prevention of breast, colon, prostate and ovarian cancers - cannot be reliably supplemented in our diet.

Holick, Dr. M., et al. “Sunlight Regulates” **Journal of Endocrinology and Metabolism**. 68:882, 1989. Matsuoka, L., et al. “Suntanning and Cutaneous Synthesis of Vitamin D3” **Journal of Clinical Medicine**. 116:87, 1990.”]

On the basis of the advice of scientific and medical experts, the Applicant states that augmenting the diet with vitamin supplements is in fact a reliable and effective treatment for Vitamin D deficiency, and is preferred as it carries none of the risks associated with exposure to UV radiation.

- (b) that moderate tanning has been conclusively shown to be associated with prevention or reduced risk of breast, colon, prostate and ovarian cancers:

[from www.fabutan.com Benefits of Indoor Tanning:

“Reduce Specific Types of Cancer

Many types of cancer - including breast, colon, prostate and ovarian - are slowed or inhibited by increased exposure to sunlight. More than 138,000 Americans die each year from breast, colon, ovarian and prostate cancers. One 1993 study claims that the widespread public adoption of regular, moderate sun exposure could prevent 30,000 breast and colon cancer deaths each year.

Garland, Dr. C., et al. “Calcium and Colon Cancer: **Clinical Nutrition**” July/August pgs. 161-166, 1986.”]

On the basis of the advice of scientific and medical experts, the Applicant states that there are not sufficient well-conducted analytical studies to conclude that either sun exposure or artificial UVB exposure will reduce the risk of any cancer. The Applicant has been advised that there have been epidemiological studies that suggest there may be correlations between the average sun exposure of a particular location and the risk for breast, colon, ovarian and prostate cancers. That is, those living at latitudes with more UV radiation from sunlight have a lower risk of the above mentioned malignancies. However, extrapolation of epidemiological associations to claim a “cause and effect” relationship is fraught with problems. Such associations may reasonably serve as the basis for hypotheses but given potential biases and confounders, they on their own are not proof of effectiveness of a therapy. A treatment effect would best be demonstrated by a randomized, placebo-controlled trial. Such a trial has not been performed.

- (c) that moderate tanning has been conclusively shown to be associated with prevention or reduced risk of heart or cardiovascular disease:

[From www.fabutan.com "Benefits of Indoor Tanning":

"Exposure to sunlight may have similar effects as exercise; decreased blood pressure, lower resting heart rate, a 39% increase in the output of blood. UV light is also known to help breakdown cholesterol.

Falkenbach, Dr. A., et al. "**Heart Rate Fitness Variability**" **Biological Effects of Light**. New York, Walter de Gruyter, 1992."]

On the basis of the advice of scientific and medical experts, the Applicant states that current research is inconclusive and that large scale randomized controlled trials are needed to establish conclusively that UVB treatments cause a significant reduction in blood pressure. Vitamin D deficiency may in some cases play a part in the development of hypertension, but deficiency should be treated with vitamin supplements.

- (d) that moderate tanning has been conclusively shown to be an effective treatment seasonal affective disorder:

[From www.fabutan.com "Benefits of Indoor Tanning":

"70% of patients with Seasonal Affective Disorder (SAD) show improvement after UV treatment, the only known cure for the "winter blues".

Wirz-Justice, A., et al. "**Light Therapy in Seasonal Affective Disorder is Dependent on Time of Day or Circadian Phase**" Arch Gen Psychiatry. 50:929, 1993."]

On the basis the advice of scientific and medical experts, the Applicant states that recommended treatment for seasonal affective disorder (SAD) is bright light treatment, involving exposure to visible light (blue/green/yellow) at least 2500 lx

at eye level for approximately 1-2 hours. The effects of bright-light treatment are thought to be mediated exclusively by the eyes, not the skin. There are no data demonstrating that SAD can be effectively treated through the use of ultraviolet tanning devices.

- (e) that moderate tanning has been conclusively shown to be associated with stimulation of the thyroid gland, resulting in an increase or boost of the metabolism:

[From www.fabutan.com “Benefits of Indoor Tanning”]:

“Sunlight stimulates the thyroid gland, which boosts your metabolism.

Hollwich, Fritz, **The Influence of Ocular Light Perception on Metabolism in Man and in Animal**. New York: Springer Verlag, 1979.”]

On the basis of the advice of scientific and medical experts, the Applicant states that the cited study relates to the effect of light entering the eye and is irrelevant to the use of tanning devices and exposure to UV radiation. Further, the applicant states that UV exposure does not in fact affect the functioning of the thyroid gland.

- (f) that moderate tanning has been conclusively shown to be associated with prevention or reduced risk of osteoporosis:

[From www.fabutan.com “Benefits of Indoor Tanning”]:

“Because UV exposure produces Vitamin D which helps in the absorption of calcium into bones, you could decrease your risk of developing osteoporosis.

“Interim Report and Recommendations for Osteoporosis”, **World Health Organization's Task Force for Osteoporosis**, November 4, 1999.”]

On the basis of the advice of scientific and medical experts, the Applicant states in order to stimulate production of Vitamin D in the body, variable but limited exposure of the body to sunlight would be required. Exposure sufficient to result in tanning is not required. Augmentation of the diet with vitamin supplements is the preferred treatment for vitamin D deficiency.

- (g) that moderate tanning has been conclusively shown to be associated with significantly reduced risk of sunburn from exposure to sunlight:

[From www.fabutan.com "Benefits of Indoor Tanning":

"Surveys have shown that indoor tanners are less likely to sunburn when they are outdoors. Indoor tanning units are designed to help you minimize your risk of sunburn. Indoor tanners are 80% less likely to sunburn outdoors than non-tanners."]

On the basis of the advice of scientific and medical experts, the Applicant states that the tan produced by UVA predominant tanning devices is equivalent to a Sun Protective Factor (SPF) of 3-4; an SPF of 15 or more is generally recommended to effectively prevent sunburn. Further, it has been established that tanning is induced after DNA has been damaged in the cells. The idea of a protective tan from the tanning devices is misleading and potentially dangerous.

- (h) that moderate tanning is not associated with significant risk of permanent skin damage, wrinkling or photo-aging of the skin, or skin cancer.

[from www.fabtuan.com "Benefits of Indoor Tanning":

"As taken from the **Smart Tan Network's Tanning Facts**, March 15, 2000.

The significant risks involved with ultraviolet light are attributed to over-exposure - not to moderate tanning. No study has ever linked moderate tanning -indoors or outdoors - as a causative factor of any kind of permanent skin damage. Sunburn and heredity, on the other hand, are the main risk factors for skin damage."]

On the basis of the advice of scientific and medical experts, the Applicant states that there is significant evidence that premature skin aging and skin damage are caused by ultraviolet radiation. Both UVA and UVB radiation have been shown to cause direct and indirect (through oxidative stress) DNA damage. UVA radiation, which makes up most of the emitted UV radiation of tanning devices, and which is not normally associated with acute damage or burns, has been found to be the main contributor to changes in the skin associated with photo-aging. Epidemiological studies have repeatedly confirmed that UV radiation is a human carcinogen and that sunlight is involved in the induction of both non-melanoma and melanoma skin cancer.

17. The Respondent makes representations similar or identical to those discussed in paragraph 16 by way of a 4" x 4" card titled "DID YOU KNOW?" available to the public at reception counters at Fabutan salons. The card is laid out in three columns: CONDITION, MEDICAL EFFECT and SOURCE. Under the CONDITIONS indicated as treatable by sunlight (and by implication indoor tanning) are: Vitamin D Deficiency, Fitness, Seasonal Affective Disorder, Obesity, Cancer Prevention, Common Cold.

Reviewable Conduct under paragraph 74.01(b) of the Act

18. Paragraph 74.01(1) of the Act provides as follows:

"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;

19. The Respondents have, on the www.fabutan.com website and by way of printed promotional materials, made representations to the public for the purpose of promoting

indoor tanning services, including representations conveying the impression that the use of indoor tanning devices for moderate tanning is:

- (a) an effective, safe and reliable way of correcting Vitamin D deficiency;
- (b) an effective way of preventing or reducing the risk of breast, colon, prostate and ovarian cancers;
- (c) an effective way of preventing or reducing the risk of heart or cardiovascular disease;
- (d) an effective way of treating seasonal affective disorder;
- (e) an effective way of increasing or boosting the metabolism through stimulation of the thyroid gland;
- (f) an effective way of preventing or reducing the risk of osteoporosis; and
- (g) an effective way of significantly reducing risk of sunburn from exposure to sunlight.

20. On the basis of the advice of scientific and medical experts, the Applicant states that Respondent has not demonstrated that the representations enumerated in paragraph 19 are based on adequate and proper tests. The Applicant states that the references furnished by the Respondent and that are purported to substantiate the representations, may point to possible links between Vitamin D levels in the body and reduced risks of certain cancers and osteoporosis, but in any case, the possible benefits of Vitamin D are available without the amount of exposure to UV radiation required to induce tanning of the skin. Tanning is the result of DNA damage in the cells.

III. Procedural Matters

21. The Commissioner requests that this proceeding be conducted in the English language.
22. The Commissioner requests the hearing of this application be heard in the City of Vancouver, British Columbia.
23. The Commissioner requests that documents for the hearing be filed in paper format.
24. The address of the head office of Fabutan Sun Tan Studios is:

5925 3rd Street SE Calgary, AB Canada T2H 1K3

25. The address of Douglas Scott McNabb and Elizabeth Gail McNabb is:

1917 27 Ave SW
Calgary, AB T2T 1H4
(403) 720-0347

Dated at Ottawa, Ontario, this ³¹~~30~~ day of March, 2005



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