

THE COMPETITION TRIBUNAL

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

AND IN THE MATTER OF subsections 74.01(1)(a), 74.01(1)(b), 74.01(6), of the *Competition Act* and certain marketing practices of Performance Marketing Ltd., Kevin Atkinson and Duane Gartman;

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-

**PERFORMANCE MARKETING LTD.,
KEVIN ATKINSON and DUANE GARTMAN**

Respondents

COMPETITION TRIBUNAL	
TRIBUNAL DE LA CONCURRENCE	
FILED	CT-2004-014
	DEC 13 2004
	C. J.
REGISTRAR - REGISTRAIRE	
OTTAWA, ON	600 (6)

CONSENT AGREEMENT

WHEREAS the Commissioner of Competition (the "Commissioner") is responsible for the administration and the enforcement of the *Competition Act* (the "Act"), including its civil deceptive marketing practices provisions, which are contained in Part VII.1 of the Act;

AND WHEREAS the Respondent, Performance Marketing Ltd. ("Performance"), is a corporation incorporated under the laws of the Province of British Columbia and the Respondents, Kevin Atkinson and Duane Gartman, are directors of Performance, all of whom are located in British Columbia;

AND WHEREAS the Respondents promote and/or sell a variety of health and sexual aid

products including diet patches through various means including over the Internet;

AND WHEREAS, beginning in or about January 2004, the Respondents, and/or their Affiliates (as defined hereinafter and listed in Appendix A), made and caused to be made representations (the "Representations") to the public through, among other channels, Performance's websites:

1. www.dyapex.com,
2. www.adultsupermart.com/more-sextoys-2-43.html,
3. www.buydietpatch.com,
4. www.extremepay.com/pages/products/zyapex.html,
5. www.gayboymall.com/index.php?sc_id=69,
6. www.rxpride.com,
7. www.herbal-healthline.com,
8. www.herbalamerica.com,
9. www.herbalhookup.com,
10. www.herbalplatinum.com,
11. www.herbalgoldnow.com,
12. www.zyapex.com

and the distribution of bulk unsolicited email messages ("SPAM") in excess of 37,000, to potential consumers, as well as on product packaging and in written materials found inside such packaging, for the purpose of promoting the use of the Dyapex and Zyapex Diet Patches and the Respondents' business interests;

AND WHEREAS the Representations were in the form of statements regarding the performance and/or efficacy of the Dyapex and Zyapex Diet Patches, that gave the general impression that the use of the patches, without need for physical exercise or dieting;

1. would result in substantial weight loss (in the range of 3 to 8 pounds every week);
2. would reduce appetite, control cravings and speed up metabolism; and
3. are a safe natural weight loss product.

AND WHEREAS the Commissioner believes that these general impressions are materially false and/or misleading, that the Dyapex and Zyapex Diet Patches do not assist the user with weight loss, that the representations which were in the form of a statement of the performance and the efficacy of the products were not based on adequate and proper tests;

AND WHEREAS the Commissioner has concluded that the Respondents have 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 WHEREAS the Parties are satisfied that this matter can be resolved with the registration of a consent agreement;

THEREFORE the Parties enter into this consent agreement to be registered based on the following terms:

1. For the purpose of this consent agreement, the following definitions shall apply:
 - a) "Affiliates": one body corporate is affiliated with another body corporate if:
 - i) one of them is the subsidiary of the other;
 - ii) both are subsidiaries of the same body corporate;
 - iii) each of them is controlled by the same person;
 - iv) both bodies corporate operate in close connection, association or in concert with one another; or, both bodies corporate operate in close connection, association or in concert with a common third corporation; or
 - v) the affiliate is the publisher/salesperson in an affiliate marketing relationship who carries out the advertising or sales of the affiliate marketing relationship, giving wider distribution to the affiliate merchant's products in return for compensation based on performance and/or sales.
 - b) "Affiliate Merchant" means the affiliate program manager/proprietor who may be the manufacturer, the reseller, or the distributor of the product. The Affiliate Merchant is responsible for implementing a sales tracking system, providing a selection of linking methods, attracting Affiliates, monitoring results, increasing results, and paying Affiliates;
 - c) "Agreement" means this consent agreement;
 - d) "Commissioner" means the Commissioner of Competition, appointed pursuant to section 7 of the Act, and her authorized representatives;
 - e) "Parties" means the Commissioner of Competition and the Respondents;
 - f) "Respondents" means Kevin Atkinson and Duane Gartman and Performance Marketing Ltd;

g) "Tribunal" means the Competition Tribunal established under the *Competition Tribunal Act*, R.S.C. 1985, c. 19 (2nd Supp.), as amended.

2. The provisions of the Agreement shall apply to:
 - a) the Respondents, all corporations, partnerships or persons under legal or contractual obligation of all or any of the Respondents or who, in connection with the marketing or sale of the Dyapex and Zyapex Diet Patches, act for, on behalf of or in concert with all or any of the Respondents, including the directors, officers and employees of the Respondent Performance, their respective successors and assigns, and other persons including agents, representatives and associates of all or any of the Respondents; and
 - b) the Commissioner.
3. The Respondents shall cease making and causing to be made, or permit Affiliates to make, by any means whatsoever, any representations to the public, whether written or otherwise, via SPAM.
4. The Respondents shall cease making and causing to be made, or permit Affiliates to make, by any means whatsoever, any representations to the public, whether written or otherwise, including on or through websites, via SPAM, on television, in printed material or verbally:
 - that are false or misleading in a material respect; or
 - regarding the performance and/or efficacy of any product supplied by the Respondents, that are not based on adequate and proper tests, copies of which have been provided or received by the Commissioner and found by the Commissioner to be adequate and proper.
5. Without limiting the generality of the foregoing, the Respondents shall cease making or causing to be made, or permit Affiliates to make statements regarding the performance and/or efficacy of the Dyapex and Zyapex Diet Patches, that give the general impression that the use of the patches will in any way assist the user of such patches in losing weight.
6. Within 30 days of a written request from an authorized representative of the Commissioner, for each sale of the Dyapex and Zyapex diet patches in the period from January 1, 2004 to the date of 20 weeks following the registration of the Agreement, the

Respondents shall provide to the Commissioner, a copy of such records as are necessary to identify the purchaser, the quantity purchased and the amount paid.

7. The Respondents shall post a corrective notice to the Agreement as set out in Appendix "B", accessible on their websites through a link ("Competition Bureau Agreement - Diet Patches"), appearing on the website home page. The link shall be in 12-point font and be in a prominent location (on Performance's website home page, at the top of the right-hand margin). The corrective notice shall contain a hyperlink to this Agreement as posted on the Tribunal's website. This corrective notice shall be posted on the referenced websites for 20 weeks, commencing no later than 10 days from registration of this Agreement.
8. The title "Notice by Performance Marketing Ltd. Re Diet Patch" found in Appendix "B" shall be in bold, 12-point font. The text of the corrective notice shall be in 10-point font, in unembellished print. The foregoing specifications shall also apply to the "Refund Notice" (as defined hereinafter), which is set out in Appendix "C" to this Agreement.
9. The Respondents shall refund the purchase price of the Dyapex and Zypex Diet Patches to persons who purchased those patches directly from Performance, from any of its Affiliates, or from any person under legal or contractual obligation to the Respondents, from any of the Respondents or, who in connection with the marketing or sale of the Dyapex and Zypex Diet Patches, acted for, on behalf of or in concert with all or any of the Respondents, upon receiving from such persons a refund request accompanied by proof of purchase in the form of:
 - i) a credit card statement or receipt denoting the purchase; or
 - ii) an e-mail confirmation of the purchase; or
 - iii) other proof of purchase (e.g. packaging, etc.).
10. To facilitate the refund process:
 - The Respondents shall post a notice to the Agreement as set out in Appendix "C" ("the Refund Notice"), accessible on their websites through a link ("Dyapex, Zypex Diet Patch Refund"), appearing on the website home page. The link shall be in 12-point font and be in a prominent location (on Performance's website home page, at the top of the right-hand margin, just below the link to the corrective notice referred to in paragraph 7). The refund notice shall be posted on the referenced websites for 20 weeks, commencing no later than 10 days from

registration of this Agreement; and

- the Respondents shall establish a toll free number that will, between the hours of 9 AM and 5 PM (Pacific Standard Time), be staffed by such person or persons as are necessary to field calls, in English and French, from prospective refundees and for the balance of the time (5 PM to 9 AM) will direct callers to a recorded message identifying the Respondents and advising callers of the hours of operation of the toll free number and/or if redirected to a call center, the operators will be provided with a script (Appendix "D") to field calls, in English and French, from prospective refundees. Between the hours 9 AM and 5 PM (Pacific Standard Time), if the toll free number(s) is busy, then callers will be directed to a recorded message advising them of that fact and inviting them to call back at a later time. The toll free number shall remain operational for 3 months after the last request for a refund is received by the Respondents.
11. Within 48 hours of posting both notices , the Respondents shall confirm in writing to the Commissioner that those notices were posted in accordance with the terms of this Agreement and provide a "screen capture" of each notice and link.
 12. Within 45 days of the registration of this Agreement, the Respondents shall establish and implement and thereafter maintain, a corporate compliance program ("Compliance Program") regarding the use and content of representations, including testimonials, made to the public to promote the sale or use of their products and their business interests. The goal of the Compliance Program will be to promote compliance with the *Competition Act*, and specifically, with the deceptive marketing provisions of the Act (Parts VI and VII.1). The Compliance Program will be framed and implemented in a manner consistent with the Commissioner's Information Bulletin on "Corporate Compliance Programs".
 13. The Compliance Program will include the following:
 - (i) the designation of a corporate compliance program officer within 30 days of the execution of this Agreement;
 - (ii) a written compliance policy ("Compliance Policy") which will include, among other things,
 - a statement by senior management stressing the company's commitment to the policies and procedures contained therein,
 - a reference to the purpose of the Act, a general description of the Act, as

well as a description of those provisions of the Act that are most relevant to the Respondents' business, including the enforcement, penalty and remedy provisions;

- clear examples to illustrate the specific practices that are prohibited, so that managers and staff at all levels can easily understand the potential application of the Act to their own duties;
- a practical code of conduct that identifies activities that are illegal or open to question;
- a statement outlining the consequences of breaching corporate policies; and
- procedures that detail exactly what an employee should do when concerns arise out of certain situations, or when possible violations of the Act are suspected; and

(iii) Training sessions to ensure that all persons to whom this Agreement applies, understand the terms of this Agreement and the Compliance Policy.

14. The Respondents shall provide the Commissioner with a copy of the Compliance Policy within 50 days of the registration of this Agreement.
15. The Respondents will provide a copy of this Agreement and the Compliance Policy to such persons who fall within the definition of Respondents and Affiliates set out in paragraphs 1(a) and (f), while the Agreement remains in force.
16. The Respondents shall ensure that each person to whom this Agreement and the Compliance Policy are provided pursuant to paragraph 10, acknowledges in writing that they have been provided with those documents and have read and understand them. Copies of all such acknowledgments shall be retained by the Respondents for three years after this Agreement ceases to apply to any such person.
17. Eighty days following the registration of this Agreement, the Respondents shall provide a written report to the Competition Bureau advising in detail the steps taken by the Respondents and Affiliates to ensure that they have complied and are complying with this Agreement.
18. Upon written request of the Deputy Commissioner of Competition, Fair Business Practices Branch, the Respondents shall submit a written report and/or produce documents on 30 days notice, with respect to any aspect of this Agreement.

19. This Agreement shall remain in force for 10 years from the date of its registration.
20. Any notice required to be given pursuant to any term of this Agreement is valid if given by facsimile transmission or registered mail to:

(a) For the Commissioner of Competition

Attention: Raymond Pierce
Deputy Commissioner of Competition
Competition Bureau
50 Victoria Street
Gatineau, Quebec K1A 0C9
Facsimile: (819) 953-4792

(b) For the Respondents

Attention: Kevin Atkinson
President
Performance Marketing Ltd.
Canadian Corporate Offices
25 Cavan Street,
Nanaimo, BC. V9R 2T9
Facsimile: 250-716-8777

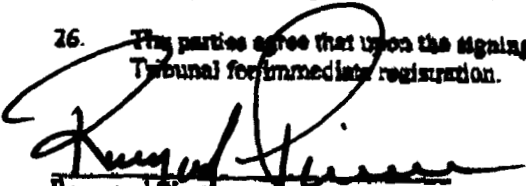
US Operational Offices
710 E Street,
Blaine, Washington. 98231

Delaware Corporate Offices
1308 Delaware Ave.,
Wilmington, Delaware. 19806

21. 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 this Agreement in the event of a change of circumstances or otherwise

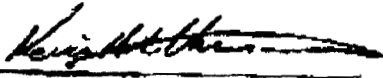
pursuant to section 74.13 of the Act, or with respect to any issue concerning this Agreement.

22. In the event of a dispute as to the interpretation or application of this Agreement, including any decision by the Commissioner pursuant to this Agreement or breach of this Agreement by the Respondents, the Commissioner may apply to the Tribunal.
23. This Agreement constitutes the entire agreement between the parties with respect to the subject matter hereof and supercedes all prior agreements, understandings, negotiations and discussions, whether written or oral.
24. This Agreement may be executed in counterpart and by facsimile and each such counterpart shall constitute an original and all of which taken together shall constitute one and the same instrument, dated as of the date set forth below.
25. This Agreement should not be construed as indicating the Commissioner's view regarding any marketing practices engaged in, or representations made by Respondents, in respect of any products other than the Dypax and Zypax patches.
26. The parties agree that upon the signing of this Agreement, it may be filed with the Tribunal for immediate registration.

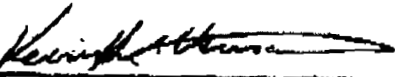

Raymond Pierch
Deputy Commissioner of Competition

Dated at Gatineau, Québec, this 12th day of December, 2004.

Performance Marketing Ltd AND Kevin Atkinson AND Duane Gertman

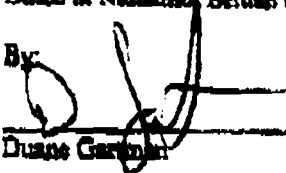
By: 
Kevin Atkinson
President and authorized signing officer

Dated at ^{Vancouver} ~~Vancouver~~, British Columbia, this 10th day of December, 2004.

By: 
Kevin Atkinson

Dated at Nanaimo, British Columbia, this 8 day of December, 2004.

By



Duane Gordon

Dated at Nanaimo, British Columbia, this 8 day of December, 2004.

Appendix "A"

The following is a list of Affiliates who participated in the sale of the products marketing by Performance Marketing Ltd.

(CONFIDENTIAL)

Appendix B

NOTICE BY Performance Marketing Ltd. Re: Diet Patches

The Commissioner of Competition has concluded that certain representations made by Performance Marketing Ltd, Kevin Atkinson and Duane Gartman, for the promotion of the Dyapex and Zypex Diet Patches were false or misleading in a material respect contrary to paragraph 74.01(1)(a) ("false or misleading representation") and paragraph 74.01(1)(b) ("adequate and proper test") of the misleading representations and deceptive marketing practices provisions of the *Competition Act*.

Link: www.ct-tc.gc.ca

Representations

These representations gave the false and misleading general impression that the use of the Dyapex and Zypex Diet Patches would, without the need for dieting or physical exercise:

- cause weight loss in the range of 3 to 8 pounds every week;
- reduce appetite, control cravings and speed up metabolism; and
- is a safe natural weight loss product.

The company has agreed, among other things, to stop using SPAM as a means of marketing, to change the representations it makes on its corporate and affiliate websites, to establish and maintain a compliance program to ensure that it abides by the deceptive marketing provisions of the *Competition Act*.

Refund

The company has also agreed to refund the purchase price of the patches to any person who purchased the Dyapex and/or Zypex Diet Patches from the company in the period from January 1, 2004 to the present. Details with respect to how to obtain a refund may be found at "[Dyapex, Zypex Diet Patch Refund](#)."

Appendix C

Dyapex and Zypex Diet Patches - Refund of Purchase Price

Any person who purchased the Dyapex and/or Zypex Diet Patch from Performance Marketing Ltd., either directly through its website, through an affiliated website, or from a person under the control of Performance, acting as an agent or representative of Performance or in concert with Performance, may obtain a refund of the purchase price on request to Performance Marketing.

To obtain a refund, purchasers must make a refund request in writing to Performance Marketing Ltd. at the address set out below and include with their request proof of purchase in the form of:

- i) a credit card statement or receipt denoting the purchase; or
- ii) an e-mail confirmation of the purchase; or
- iii) other proof of purchase (e.g. packaging, etc)

Attention: Kevin Atkinson
President
Performance Marketing Ltd.
Canadian Corporate Offices
25 Cavan Street,
Nanaimo, BC. V9R 2T9
Facsimile: 250-716-8777

Any questions regarding refunds should be directed to Performance Marketing Ltd. At:

1-888-777-6661

Appendix D

**Calls concerning the reimbursement of the purchase price for the
Dyapex and Zypex Diet Patches**

The following information should be used for all calls concerning a refund for the purchase price of the Dyapex and Zypex Diet Patches by persons who purchase those patches directly from Performance Marketing Ltd., from its Affiliates or from any other sources acting on behalf of the Respondents.

A- Calls received between the hours of 9 AM and 5 PM :

- Determine if it is the relevant product:

All persons who:

- purchased the Dyapex or Zypex Diet Patches:

- Ask questions to verify if it is one of the relevant products.

- Determine if it was purchased directly from Performance Marketing Ltd., from its Affiliates or from any other sources acting on behalf of the Respondents.

- If it is the relevant product:

- Inform the persons that they are required to submit a refund request accompanied by proof of purchase in the form of:

- a credit card statement or receipt denoting the purchase; or

- an e-mail confirmation of the purchase; or

- other proof of purchase (e.g. packaging).

- Provide the address where the refund should be sent and indicate the period of time it will

take for the refund to be received.

B- Calls between 5 PM and 9 AM

- Persons calling the toll free number who are greeted by a recorded message should have the following option: "If you are calling for a refund for the purchase price of the Dyapex or Zypex Diet Patches, please press"

- A recorded message would then inform the callers: "You can obtain a refund for the purchase price of the Dyapex or Zypex Diet Patches by sending a refund request to (give complete address) with a proof of purchase, which can be a credit card statement, or a receipt denoting the purchase, an email confirmation of the purchase or the actual packaging of the product. Please expect to receive the refund (mention period of time) after we have received your request."

-Persons calling the toll free number who are greeted by a call center employee should be asked the same questions and given the same information as provided during the 9am to 5pm time frame.