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FILED

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Division of Consumer Affairs

By: Frank J. Marasco
Deputy Attorney General
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STATE OF NEW JERSEY
DEPARTMENT OF LAW & PUBLIC SAFETY
DIVISION OF CONSUMER AFFAIRS

In the Matter of

ANTHONY & SYLVAN POOLS

Administrative Action

CONSENT ORDER

WHEREAS this matter having been opened by the New Jersey Division of Consumer Affairs, Office of Consumer Protection (“Division”), as an investigation to ascertain whether violations of the New Jersey Consumer Fraud Act, N.J.S.A. 56:8-1 et seq. (“CFA”), the Contractors’ Registration Act, N.J.S.A. 56:8-136 et seq., the Regulations Governing Home Improvement Practices, N.J.A.C. 13:45A-16.1 et seq. (“Home Improvement Regulations”), and the Regulations Governing Home Improvement Contractor Registration, N.J.A.C. 13:45A-17.1 et seq. (“Contractor Registration Regulations”), have been or are being committed by Anthony & Sylvan Pools, an Ohio corporation authorized to do business in the State of New Jersey (“State”), as well as its owners, officers, directors, managers, employees, representatives, agents, subsidiaries, successors and assigns (collectively, “Respondent”) (hereinafter, the “Investigation”);

WHEREAS the Respondent has voluntarily and fully cooperated with the Division and provided information to assist with the Investigation;

WHEREAS the Respondent has attempted in good faith to resolve all outstanding Consumer complaints by making repairs and/or compensating Consumers;

WHEREAS the Respondent is committed to compliance and customer satisfaction and effectively responding to any Consumer complaints;

WHEREAS the Respondent has at all relevant times been a Contractor registered with the Division;

WHEREAS the Respondent, after learning during the course of the Investigation that some of its subcontractors had not registered with the Division, took immediate steps with the assistance of the Division to ensure that its subcontractors registered with the Division before performing work in the State;

WHEREAS the Respondent denies that it has committed any violation of the CFA, the Contractors' Registration Act, the Home Improvement Regulations and/or the Contractor Registration Regulations; and

WHEREAS the Division and Respondent (collectively, the "Parties") have reached an amicable agreement thereby resolving the issues in controversy and concluding this matter without the need for further action, and Respondent having voluntarily cooperated and consented to the entry of the within order ("Consent Order") without having admitted any violation of law or finding of fact, and for good cause shown,

IT IS ORDERED AND AGREED as follows:

1. **EFFECTIVE DATE**

1.1 This Consent Order shall be effective on the date that it is filed with the Division (“Effective Date”).

2. **DEFINITIONS**

As used in this Consent Order, the following words or terms shall have the following meanings, which meanings shall apply wherever the words and terms appear in this Consent Order:

2.1 “Additional Consumer” shall refer to any Consumer who submits to the Division directly or through another agency a written Consumer complaint concerning Respondent’s business practices after the Effective Date.

2.2 “ADR Unit” shall refer to the Alternative Dispute Resolution Unit of the Division.

2.3 “Advertisement” shall be defined in accordance with N.J.S.A. 56:8-1(c). This definition shall apply to other forms of the word “Advertisement” including, without limitation, “Advertise,” “Advertised” and “Advertising.” For purposes of the Contractor Registration Regulations, “Advertise” shall be defined in accordance with N.J.A.C. 13:45A-9.1.

2.4 “Affected Consumer” shall refer to those Consumers who entered into Home Improvement Contracts with Respondent for Home Improvements including, but not limited to, the construction and installation of swimming pools.

2.5 “Attorney General” shall refer to the Attorney General of New Jersey and the Office of the Attorney General of the State of New Jersey.

2.6 “Consumer” shall refer to any Person who is offered Merchandise for Sale.

2.7 “Contractor” shall be defined in accordance with N.J.S.A. 56:8-137.

2.8 “Home Improvement” shall be defined in accordance with N.J.S.A. 56:8-137, N.J.A.C. 13:45A-16.1 and N.J.A.C. 13:45A-17.2.

2.9 “Home Improvement Contract” shall be defined in accordance with N.J.S.A. 56:8-137, N.J.A.C. 13:45A-16.1 and N.J.A.C. 13:45A-17.2.

2.10 “HIC Registration Application” shall refer to the Home Improvement Contractor and/or Subcontractor Application for Initial Registration that must be submitted to the Division pursuant to the Contractors’ Registration Act and the Contractor Registration Regulations.

2.11 “Merchandise” shall be defined in accordance with N.J.S.A. 56:8-1(c).

2.12 “Person[s]” shall be defined in accordance with N.J.S.A. 56:-8-1(d).

2.13 “Represent” shall mean to state or imply through claims, statements, questions, conduct, graphics, symbols, lettering, formats, devices, language, documents, messages or any other manner or means by which meaning might be conveyed. This definition applies to other forms of the word “Represent” including, without limitation, “Representation.”

2.14 “Restitution” shall refer to all methods undertaken by Respondent to resolve Consumer complaints including, but not limited to, the issuance of credits or refunds or the reversal of credit card or debit card charges.

2.15 “Sale” shall be defined in accordance with N.J.S.A. 56:8-1(c).

3. INJUNCTIVE RELIEF AND BUSINESS PRACTICES

3.1 Respondent shall comply with all State laws, rules and regulations as now constituted or as may hereafter be amended that are applicable to the conduct of its business in the State including, but not limited to, the CFA, the Contractors’ Registration Act, the Home Improvement Regulations and/or the Contractor Registration Regulations.

3.2 Respondent shall ensure that all subcontractors utilized by Respondent in the performance of any Home Improvement are registered with the Division as Contractors in accordance with the Contractors' Registration Act and the Contractor Registration Regulations.

3.3 Respondent shall not require Consumers to make final payment on a Home Improvement Contract before the Home Improvement is complete in accordance with the terms of the Home Improvement Contract, pursuant to N.J.A.C. 13:45A-16.2(a)(6)(v).

3.4 Respondent Represents and warrants that at present it employs a business practice whereby it sets forth within its Home Improvement Contracts all applicable warranties and/or guarantees. Respondent shall maintain this business practice and set forth all applicable warranties and/or guarantees within its Home Improvement Contracts, in accordance with N.J.A.C. 13:45A-16.2(a)(11)(ii), and shall honor any applicable warranties and/or guarantees made in connection with a Home Improvement Contract.

3.5 Respondent Represents and warrants that at present all company representatives are trained with regard to the products and materials to be used in any Home Improvement in order to ensure that any and all Representations regarding products and materials are accurate, in accordance with N.J.A.C. 13:45A-16.2(a)(2). Respondent shall maintain this business practice and ensure that any and all Representations regarding the quality of products or materials to be used in Home Improvements are accurate, in accordance with N.J.A.C. 13:45A-16.2(a)(2).

3.6 Respondent shall include in its Home Improvement Contracts the dates or time period on or within which the work is to begin and be completed, in accordance with N.J.A.C. 13:45A-16.2(a)(12)(iv).

3.7 Respondent shall include in Home Improvement Contracts, as well as all writings reflecting changes in the terms and conditions of Home Improvement Contracts, the signatures of both parties, in accordance with N.J.S.A. 56:8-151(a) and N.J.A.C. 13:45A-16.2(a)(12).

3.8 Respondent shall give timely written notice to Consumers of the reasons beyond Respondent's control for any delay in performance, pursuant to N.J.A.C. 13:45A-16.2(a)(7)(iii).

3.9 Respondent shall include in Home Improvement Contracts its legal name, business address, and Contractor registration number, as well as the legal name and business address of the sales representatives or agent who solicited or negotiated the Home Improvement Contract on behalf of Respondent, in accordance with N.J.S.A. 56:8-151(a)(1) and N.J.A.C. 13:45A-16.2(a)(12)(i).

4. FUTURE CONSUMER COMPLAINTS

4.1 For a period of one (1) year from the Effective Date, the Division shall forward to Respondent copies of any Additional Consumer complaints received by the Division or forwarded to the Division by any Consumer Affairs Local Assistance ("CALA") office. The Division shall forward to Respondent the Additional Consumer complaint within thirty (30) days of the Division's receipt thereof,

4.2 During this one (1) year period, the Division shall notify the Additional Consumers, in writing, of the following: (a) that the Additional Consumer complaint has been forwarded to Respondent; (b) that he/she should expect a response from Respondent within thirty (30) days; and (c) the right to refer the Additional Consumer complaint to the ADR Unit for binding arbitration if Respondent disputes the Additional Consumer complaint and/or requested relief.

4.3 Within thirty (30) days of receiving the Additional Consumer complaint from the Division, Respondent shall send a written response to each Additional Consumer, with a copy to the following: The New Jersey Division of Consumer Affairs, Office of Consumer Protection, Attention: Case Management Tracking Supervisor, 124 Halsey Street, P.O. Box 45025, Newark, New Jersey 07101.

4.4 If Respondent does not dispute the Additional Consumer's complaint and requested relief, Respondent's written response shall so inform the Additional Consumer. Respondent shall contemporaneously forward to such Additional Consumer the appropriate Restitution. Where Restitution concerns the reversal of credit or debit card charges, Respondent shall include documents evidencing that such adjustments have been made. Where Restitution concerns a refund or other payment, such shall be made by certified check, money order or other guaranteed funds made payable to the Additional Consumer.

4.5 If Respondent disputes the Additional Consumer's complaint and/or requested relief, Respondent's written response shall include copies of all documents concerning the Respondent's dispute of the complaint.

4.6 Within forty-five (45) days of Respondent's receipt of the Additional Consumer complaint, Respondent shall notify the Division as to whether such Additional Consumer complaint has been resolved. Such notification shall include the following:

- (a) The name and address of the Additional Consumer;
- (b) Whether or not the Additional Consumer complaint has been resolved;
- (c) An identification of any Restitution provided to the Additional Consumer;
- (d) Copies of all documents evidencing any Restitution;

- (e) In the event Respondent's written response was returned as undeliverable, the efforts Respondent had undertaken to locate the Additional Consumer; and
- (f) Confirmation that Respondent sent all mailings to the Additional Consumer as required by this Section.

Following the Division's receipt and verification that an Additional Consumer Complaint has been resolved, the Additional Consumer Complaint shall be deemed closed for purposes of this Consent Order.

4.7 If within sixty (60) days of Respondent's receipt of the Additional Consumer complaint: (a) Respondent has not notified the Division that the Additional Consumer complaint has been resolved; (b) Respondent has notified the Division that the Additional Consumer complaint has not been resolved; or (c) Respondent has notified the Division that the Additional Consumer refuses Respondent's offer of Restitution, the Division shall forward such Additional Consumer complaint to the ADR Unit to reach a resolution of the complaint through binding arbitration. Respondent agrees herein to consent to this arbitration process and to be bound by the arbitrator's decision. Respondent further agrees to be bound by the immunity provisions of the New Jersey Arbitration Act, N.J.S.A. 2A:23B-14, and the New Jersey Tort Claims Act, N.J.S.A. 59:1-1 et seq. The Division shall notify in writing the Additional Consumer of the referral of the complaint to the ADR Unit. Thereafter, the arbitration shall proceed in accordance with the ADR Guidelines (a copy of which is attached as Exhibit A).

4.8 If Respondent refuses to participate in the ADR program, the arbitrator may enter a default against the Respondent. Unless otherwise specified in the arbitration award, Respondent shall pay all arbitration awards within thirty (30) days of the arbitrator's decision. Respondent's failure or refusal to participate in the arbitration process or to pay an arbitration award timely shall constitute a violation of this Consent Order.

4.9 If an Additional Consumer refuses to participate in the ADR program, that Additional Consumer's complaint shall be deemed closed for the purposes of this Consent Order.

4.10 The Parties may agree in writing to alter any time periods or deadlines set forth in this Section.

4.11 At the conclusion of the one (1) year period, the complaint resolution procedure set forth above shall automatically renew for successive one (1) year periods unless either the Division or Respondent provides written notice of termination within thirty (30) days of the anniversary date.

5. SETTLEMENT PAYMENT

5.1 The Parties have agreed to a Settlement of the Investigation in the amount of One Hundred Eighty Thousand Dollars (\$180,000.00) ("Settlement Payment").

5.2 The Settlement Payment is made pursuant to N.J.S.A. 56:8-11, N.J.S.A. 56:8-13 and N.J.S.A. 56:8-19.

5.3 The Respondent shall make the Settlement Payment in twelve (12) equal installments of Fifteen Thousand Dollars (\$15,000.00) due on the fifteenth day of each month commencing March 15, 2010 until February 15, 2011.

5.4 The Respondent shall make the Settlement Payment by wire transfer made payable to "New Jersey Division of Consumer Affairs" and forwarded to the undersigned:

New Jersey Division of Consumer Affairs
Office of Consumer Protection
124 Halsey Street - 7th Floor
P.O. Box 45025
Newark, New Jersey 07101
Attn: Case Management Tracking Unit

5.5 Upon making each installment of the Settlement Payment, Respondent shall immediately be fully divested of any interest in, or ownership of, the monies paid and all interest

in the monies, and subsequent interest or income derived therefrom, shall inure entirely to the benefit of the Division pursuant to the terms herein.

5.6 In the event Respondent fails to make any of the installment payments referred to in Section 5.3, the entire unpaid balance of the Settlement Payment shall become immediately due and payable upon written notice ("Notice of Noncompliance") to Respondent c/o Paul H. Zoubek, Esq., Montgomery, McCracken, Walker & Rhoads LLP, 457 Haddonfield Road, Suite 600, Cherry Hill, New Jersey 08002-2200. Respondent shall have fifteen (15) days from receipt of the Notice of Noncompliance to cure said noncompliance ("Cure Period"). If Respondent cures the noncompliance within the Cure Period, the Notice of Noncompliance shall be deemed withdrawn. If Respondent fails to cure the noncompliance within the Cure Period, the Division may move on notice to Respondent by Order to Show Cause or by motion to demonstrate the noncompliance and failure to cure by Respondent and to seek final judgment for the entire remaining balance of the Settlement Payment together with attorneys' fees and cost.

6. GENERAL PROVISIONS

6.1 This Consent Order is entered into by the Parties as their own free and voluntary act and with full knowledge and understanding of the obligations and duties imposed by this Consent Order.

6.2 This Consent Order shall be governed by, and construed and enforced in accordance with, the laws of the State.

6.3 The Parties have negotiated, jointly drafted and fully reviewed the terms of this Consent Order and the rule that uncertainty or ambiguity is to be construed against the drafter shall not apply to the construction or interpretation of this Consent Order.

6.4 This Consent Order contains the entire agreement among the Parties. Except as otherwise provided herein, this Consent Order shall be modified only by a written instrument signed by or on behalf of the Division and Respondent.

6.5 Except as otherwise explicitly provided in this Consent Order, nothing herein shall be construed to limit the authority of the Attorney General to protect the interest of the State or the people of the State.

6.6 If any portion of this Consent Order is held invalid or unenforceable by operation of law, the remaining terms of this Consent Order shall not be affected.

6.7 This Consent Order shall be binding upon Respondent as well as its owners, officers, directors, shareholders, founders, managers, agents, servants, employees, representatives, successors and assigns, and any entity or device through which it may now or hereafter act, as well as any Persons who have authority to control or who, in fact, control and direct its business.

6.8 This Consent Order shall be binding upon the Parties and their successors in interest. In no event shall assignment of any right, power or authority under this Consent Order avoid compliance with this Consent Order.

6.9 This Consent Order is agreed to by the Parties and entered into by the Division for settlement purposes only. Neither the fact of, nor any provision contained in this Consent Order nor any action taken hereunder shall constitute, or be construed as: (a) an approval, sanction or authorization by the Attorney General, the Division or any other governmental unit of the State of any acts or practices of the Respondent; and (b) an admission by Respondent that any of its acts or practices described in or prohibited by this Consent Order are unfair or deceptive or violate the CFA, the Contractor's Registration Act, the Home Improvement Regulations and/or

the Contractor Registration Regulations. This Consent Order is not intended, and shall not be deemed, to constitute evidence or precedent of any kind, except in: (a) any action or proceeding by one of the Parties to enforce, rescind or otherwise implement or affirm any or all of the terms of this Consent Order; or (b) any action or proceeding involving a Released Claim (as defined in Section 7) to support a defense of res judicata, collateral estoppel, release or other theory of claim preclusion, issue preclusion or similar defense.

6.10 Unless otherwise prohibited by law, any signatures by the Parties required for entry of this Consent Order may be executed in counterparts, each of which shall be deemed an original but all of which shall together be one and the same Consent Order.

6.11 The Parties Represent and warrant that an authorized representative of each has signed this Consent Order with full knowledge, understanding and acceptance of its terms, and that this Person has done so with authority to legally bind the respective party.

7. RELEASE

7.1 In consideration of the injunctive relief, payments, undertakings, mutual promises and obligations provided for in this Consent Order and conditioned upon Respondent making the Settlement Payment in the manner specified in Section 5, the Division hereby agrees to release Respondent from any and all civil claims or Consumer related administrative claims, to the extent permitted by State law, which the Division could have brought prior to the Effective Date against Respondent for violations of the CFA, the Contractors' Registration Act, the Home Improvement Regulations and the Contractor Registration Regulations arising from the Investigation as well as the matters specifically addressed in this Consent Order ("Released Claims").

7.2 Notwithstanding any term of this Consent Order, the following do not comprise Released Claims: (a) private rights of action; and (b) any claims against Respondent by any other agency or subdivision of the State.

8. **PENALTIES FOR FAILURE TO COMPLY**

8.1 The Attorney General (or designated representative) shall have the authority to enforce the injunctive provisions of this Consent Order or to seek sanctions for violations hereof or both.

8.2 Notwithstanding the fact that Respondent has not admitted any violation of law by entering into this Consent Order, the Parties agree that any Court finding, after the Effective Date, that Respondent has violated the injunctive provisions of this Consent Order, the CFA, the Contractors' Registration Act, the Home Improvement Regulations and/or Contractor Registration Regulations, shall subject Respondent to enhanced civil penalties pursuant to N.J.S.A. 56:8-13.

9. **COMPLIANCE WITH ALL LAWS**

9.1 Except as provided in this Consent Order, no provision herein shall be construed as:

- (a) Relieving Respondent of its obligation to comply with all State and Federal laws, regulations or rules, as now constituted or as may hereafter be amended, or as granting permission to engage in any acts or practices prohibited by such laws, regulations or rules; or
- (b) Limiting or expanding any right the Division may otherwise have to obtain information, documents or testimony from Respondent pursuant to any State or Federal law, regulation or rule, as now constituted or as may hereafter be amended, or limiting or expanding any right Respondent may otherwise have pursuant to any State or Federal law, regulation or rule, to oppose any process employed by the Division to obtain such information, documents or testimony.

10. **NOTICES UNDER THIS CONSENT ORDER**

10.1 Except as otherwise provided herein, any notices or other documents required to be sent to the Division or Respondent pursuant to this Consent Order shall be sent by United States mail, Certified Mail Return Receipt Requested, or other nationally recognized courier service that provides for tracking services and identification of the person signing for the documents. The notices and/or documents shall be sent to the following addresses:

For the Division:

Frank J. Marasco, Deputy Attorney General
Consumer Fraud Prosecution Section
Division of Law
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101

For Respondent:

Paul H. Zoubek, Esq.
Montgomery, McCracken, Walker & Rhoads, LLP
457 Haddonfield Road, Suite 600
Cherry Hill, New Jersey 08002-2220

Michael Sprenger, Esq.
Chernett Wasserman Yarger, LLC
The Tower at Erieview
1301 East 9th Street, Suite 3300
Cleveland, Ohio 44114

Howard Wertman
President
Anthony & Sylvan Pools
3739 Easton Road
Doylestown, PA 18901

IT IS ON THE 11th DAY OF March, 2010 SO ORDERED.

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: 

SHARON M. JOYCE, ACTING DIRECTOR
DIVISION OF CONSUMER AFFAIRS

THE PARTIES CONSENT TO THE FORM, CONTENT AND ENTRY OF THIS
CONSENT ORDER ON THE DATES UNDER THEIR RESPECTIVE SIGNATURES.

FOR THE DIVISION:

PAULA T. DOW
ATTORNEY GENERAL OF NEW JERSEY

By: 

Frank J. Marasco
Deputy Attorney General
Consumer Fraud Prosecution Section
124 Halsey Street - 5th Floor
P.O. Box 45029
Newark, New Jersey 07101

Dated: 3/8/, 2010

FOR THE RESPONDENT:

By: 

Paul H. Zoubek, Esq.
Montgomery, McCracken,
Walker & Rhoads, LLP
457 Haddonfield Road, Suite 600
Cherry Hill, New Jersey 08002-2220

Dated: 3/5/, 2010

ANTHONY & SYLVAN POOLS

By: _____

A large, stylized handwritten signature in black ink, written over a horizontal line. The signature is highly cursive and difficult to decipher, but appears to contain the initials 'AP'.

Dated: _____, 2010

3/4/10