

ESTTA Tracking number: **ESTTA111126**

Filing date: **11/22/2006**

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91173378
Party	Defendant FKA DISTRIBUTING CO. d/b/a HOMEDICS, INC. FKA DISTRIBUTING CO. d/b/a HOMEDICS, INC . 3000 Pontiac Trail , MI 48390
Correspondence Address	MATTHEW R. MOWERS BROOKS KUSHMAN P.C. 1000 TOWN CENTER, 22ND FLOOR SOUTHFIELD, MI 48075-1238
Submission	Answer
Filer's Name	Mark A. Cantor
Filer's e-mail	mcantor@brookskushman.com,mmowers@brookskushman.com,peter.brody@ropesgray.com
Signature	/mark a. cantor/
Date	11/22/2006
Attachments	sgibbons@ ans_2006-11-22_130926.pdf (4 pages)(110036 bytes)

**UNITED STATES PATENT AND TRADEMARK OFFICE
TRADEMARK TRIAL AND APPEAL BOARD**

DREAMWELL, LTD.

Opposer

Opposition No. 91173378

Application No. 78738245

v.

FKA DISTRIBUTING CO.
d/b/a HOMEDICS, INC.

Applicant.

ANSWER AND AFFIRMATIVE DEFENSES

Commissioner for Trademarks
P.O. Box 1451
Alexandria, VA 22313-1451

Applicant, FKA Distributing Co. d/b/a HoMedics, Inc. ("FKA"), by and through its undersigned attorneys, hereby responds to the like-numbered paragraphs of the Opposer Dreamwell, Ltd.'s ("Opposer") Notice Of Opposition as follows:

1. FKA is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations of paragraph 1, and therefore denies the same.
2. FKA acknowledges the existence of the U.S. Trademark registrations listed in paragraph 2 of Opposer's Notice of Opposition. FKA is without knowledge or information sufficient to form a belief as to the truth or falsity of the status and/or ownership of these registrations or remaining allegations of paragraph 2, and therefore denies the same.

3. Denied.

4. Denied.

5. Denied.

6. Denied.

7. FKA acknowledges that the United States Patent and Trademark Office's TTABVUE Trademark Trial and Appeal Board Inquiry System lists a 90 Day Requests for Extension of Time to Oppose for Good Cause Application Serial No. 78/738,245 document filed by Opposer on August 3, 2006. Further, Applicant acknowledges a document listed on the TTABVUE system indicating that the Trademark Trial and Appeal Board granted Opposer's request on August 3, 2006.

8. Denied.

9. Denied.

10. Denied.

AFFIRMATIVE DEFENSES

For further answering the Notice of Opposition, FKA alleges the following affirmative defenses, without assuming the burden of proof on such defenses that would otherwise rest with Opposer:

1. There is no likelihood of confusion, mistake or deception with respect to the uses of the parties' respective marks.

2. Opposer has no rights to stop the use of the terms BEAUTY and SLEEP, individually or in combination, in another's trademark.

3. Opposer's Notice of Opposition fails to state a claim upon which relief may be granted.

4. Opposer's Notice of Opposition is barred by accord and satisfaction, estoppel, agreement, and/or waiver in view of an agreement entered into between Applicant and Opposer with respect to the subject mark. In particular, Opposer and Applicant reached an agreement that Opposer would not contest Applicant's rights in the subject mark if Applicant were to abandon its rights to the mark BEAUTYRX (Application Serial No. 78/738,152) and BEAUTY PRESCRIPTION (Application Serial No. 78/738,202).

5. Applicant relied on said agreement and, indeed, abandoned such marks. Notwithstanding the agreement by Opposer, Opposer nevertheless filed a Notice of Opposition in direct violation and in contravention of the agreement between the parties.

6. FKA reserves the right to assert additional affirmative defenses learned in discovery or otherwise.

In conclusion, FKA respectfully requests that this Opposition Proceeding be dismissed and that its registration issue forthwith.

Respectfully submitted,

BROOKS KUSHMAN P.C.

By: 

Mark A. Cantor
Matthew R. Mowers
1000 Town Center
Twenty-Second Floor
Southfield, Michigan 48075
Attorneys for Applicant

Dated: November 22, 2006

CERTIFICATE OF TRANSMITTAL

I hereby certify that this correspondence is being electronically transmitted in PDF format to the Trademark Trial and Appeal Board through the Electronic System for Trademark Trials and Appeals (ESTTA) on the following date:

Date: November 22, 2006



Mark A. Cantor

CERTIFICATE OF SERVICE

I hereby certify that this correspondence is being electronically served on counsel for Dreamwell, Ltd., Peter M. Brody, via email to peter.brody@ropesgray.com on the following date:

Date: November 22, 2006



Mark A. Cantor