

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

DREAMWELL, LTD.

Opposer

Opposition No. 91173378  
Application No. 78/738,245

v.

FKA DISTRIBUTING CO. D/B/A  
HOMEDICS, INC.,

**TTAB**

Applicant.

**APPLICANT'S RESPONSE TO OPPOSER'S FIRST  
REQUEST FOR PRODUCTION OF DOCUMENTS  
AND THINGS (NOS. 1-10)**

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



06-07-2007

**I. GENERAL OBJECTIONS**

FKA Distributing Co. d/b/a HoMedics, Inc. ("FKA") objects to the instructions, definitions and the following requests to the extent they seek information outside the scope of discovery permitted under Fed. R. Civ. P. 26, including information subject to the attorney-client privilege and/or work product doctrine. Information subject to attorney-client privilege and/or work product immunity generated prior to suit will be identified in a privilege log for exchange with Dreamwell, Ltd. ("Opposer") at a mutually agreeable date.

FKA objects to Opposer's requests as vague, ambiguous, overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek all information, in the broadest sense, concerning, relating to, referring to, describing, evidencing, constituting or comprising the subject matters thereof. FKA's responses to Opposer's requests are subject to, and without waiver of, this objection. FKA will make its best efforts to produce all relevant, non-privileged, reasonably responsive information to the extent it is reasonably available.

FKA objects to Opposer's document requests to the extent they seek answers containing confidential or proprietary information. Intentional and inadvertent disclosure or use of FKA's confidential or proprietary information may harm or disadvantage FKA. For this reason, FKA will not produce documents until a suitable confidentiality protective order is entered in this case.

FKA objects to Opposer's document requests as vague and that they do not specify a time frame.

FKA further objects to Opposer's document requests to the extent they seek information not in FKA's possession and control. FKA reserves its right to object to the admissibility at trial of any response made herein, and FKA's responses are not and shall not be deemed an admission or concession of the relevance of any of the document requests and subject matter thereof, or an admission or concession as to the admissibility of any response at the trial of this action.

Discovery is ongoing in this case. FKA reserves the right to modify or supplement the information provided in its answers to these document requests should it discover additional information, or should Opposer change its position in this case. FKA's responses to these document requests are subject to, and without waiver or limitation of, these objections and reservations.

## **II. RESPONSES**

FKA incorporates each of the general objections set forth above into each of its requests set forth below. Each of the requests below are subject to these general objections, as well as further objections set forth below, and responses are made without waiver or limitation of these objections.

## **DOCUMENTS AND THINGS REQUESTED**

### **DOCUMENT REQUEST NO. 1.**

Documents sufficient to identify all goods or services in connection with which the Subject Mark has been used, is being used, or is intended or expected to be used.

#### **RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that it has yet to begin use of this mark in commerce. FKA identifies U.S. Trademark Application No. 78/738,245 for the mark THE BEAUTY OF SLEEPING WELL as identifying the goods and services intended for use in connection with the Subject Mark.

### **DOCUMENT REQUEST NO. 2.**

Documents sufficient to identify the manner or manners in which the Subject Mark has been used, is being used, or is intended or expected to be used.

#### **RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that it has yet to begin use of this mark in commerce. FKA identifies U.S. Trademark Application No. 78/738,245 for the mark THE BEAUTY OF SLEEPING WELL as identifying the manner in which the Subject Mark is intended for use.

**DOCUMENT REQUEST NO. 3.**

A copy, sample, or photograph of all goods on which the Subject Mark has appeared, currently appears, or is intended or expected to appear, including but not limited to any tags, labels, packaging, package inserts, or displays, created or designed by or for Applicant, that bear or include the Subject Mark.

**RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA does not possess any such documents.

**DOCUMENT REQUEST NO. 4**

A representative sample of each advertisement and promotional matter in which the Subject Mark has appeared.

**RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA does not possess any such documents.

**DOCUMENT REQUEST NO. 5.**

All documents that refer or relate to any market research that Applicant has performed or which has been performed on its behalf with respect to each good or service, in connection with which the Subject Mark has been used, is being used, will be used, or has been considered for use.

**RESPONSE:**

FKA objects to this request on at least two grounds. First, FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Second, the requested information is confidential and proprietary. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide the requested information.

**DOCUMENT REQUEST NO. 6.**

All documents that refer or relate to or which show Applicant's activities in preparation for the commencement of use of the Subject Mark.

**RESPONSE:**

FKA objects to this request on at least two grounds. First, FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Second, the requested information is confidential and proprietary. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide the requested information.

**DOCUMENT REQUEST NO. 7.**

All documents that refer or relate to instances of confusion on the part of any person regarding whether Applicant's goods are made, sold, sponsored, licensed, or endorsed by, or otherwise are related to, Opposer, or vice-versa.

**RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA is not aware of any instances of confusion and does not possess any such documents.

**DOCUMENT REQUEST NO. 8.**

All documents on which Applicant relies in support of the allegations made in Applicant's Affirmative defenses.

**RESPONSE:**

FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA will make reasonable efforts to provide such documents.

**DOCUMENT REQUEST NO. 9.**

All communications between Applicant and Opposer, or their attorneys, that refer or relate to the Subject Mark.

**RESPONSE:**

FKA objects that Opposer's request for all such documents and things as seeking information not reasonable calculated to lead to the discovery of admissible evidence and calls for material that is protected by the attorney-client or work-product privilege.

**DOCUMENT REQUEST NO. 10.**

All documents referred to or relied on in preparing Applicant's responses to Opposers' First Set Of Interrogatories To Applicant.

**RESPONSE:**

FKA objects to this request on at least three grounds. First, FKA objects to this request as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Second, FKA objects to this request as calling for material that is protected by the attorney-client or work-product privilege. Third, the requested information is confidential and proprietary. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide the requested information.

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: June 4, 2007

**CERTIFICATE OF SERVICE**

I certify that I served:

**APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF  
REQUESTS FOR PRODUCTION OF DOCUMENTS AND THINGS  
(NOS. 1-10)**

on **June 4, 2007** by:

delivering (via facsimile)

mailing (via First-Class mail)

a copy to:

Peter M. Brody  
Matthew R. Clements  
**FISH & NEAVE IP GROUP  
ROPES & GRAY LLP**  
One Metro Center  
700 12<sup>th</sup> Street, NW  
Suite 900  
Washington, D.C. 20005

*Attorneys for Opposer*

*Carolyn Bielaniec*  
\_\_\_\_\_  
**CAROLYN BIELANIEC**

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

DREAMWELL, LTD.

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Opposer

Opposition No. 91173378  
Application No. 78/738,245

v.

FKA DISTRIBUTING CO. D/B/A  
HOMEDICS, INC.,

Applicant.

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**APPLICANT'S RESPONSE TO OPPOSER'S  
FIRST SET OF INTERROGATORIES (NOS. 1-9)**

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

**I. GENERAL OBJECTIONS**

FKA Distributing Co. d/b/a HoMedics, Inc. ("FKA") objects to the instructions, definitions and the following interrogatories to the extent they seek information outside the scope of discovery permitted under Fed. R. Civ. P. 26, including information subject to the attorney-client privilege and/or work product doctrine. Information subject to attorney-client privilege and/or work product immunity generated prior to suit will be identified in a privilege log for exchange with Dreamwell, Ltd. ("Opposer") at a mutually agreeable date.

FKA objects to Opposer's interrogatories as vague, ambiguous, overly broad, unduly burdensome, irrelevant and not reasonably calculated to lead to the discovery of admissible evidence to the extent they seek all information, in the broadest sense, concerning, relating to, referring to, describing, evidencing, constituting or comprising the subject matters thereof. FKA's responses to Opposer's requests are subject to, and without waiver of, this objection. FKA will make its best efforts to produce all relevant, non-privileged, reasonably responsive information to the extent it is reasonably available.

FKA objects to Opposer's interrogatories to the extent they seek answers containing confidential or proprietary information. Intentional and inadvertent disclosure or use of FKA's confidential or proprietary information may harm or disadvantage FKA. For this reason, FKA will not produce documents until a suitable confidentiality protective order is entered in this case.

FKA objects to Opposer's interrogatories as vague and that they do not specify a time frame.

FKA further objects to Opposer's interrogatories to the extent they seek information not in FKA's possession and control. FKA reserves its right to object to the admissibility at trial of any response made herein, and FKA's responses are not and shall not be deemed an admission or concession of the relevance of any of the requests and subject matter thereof, or an admission or concession as to the admissibility of any response at the trial of this action.

Discovery is ongoing in this case. FKA reserves the right to modify or supplement the information provided in its answers to these interrogatories should it discover additional information, or should Opposer change its position in this case. FKA's responses to these interrogatories are subject to, and without waiver or limitation of, these objections and reservations.

## **II. RESPONSES**

FKA incorporates each of the general objections set forth above into each of its interrogatories set forth below. Each of the interrogatories below are subject to these general objections, as well as further objections set forth below, and responses are made without waiver or limitation of these objections.

## INTERROGATORIES

### INTERROGATORY NO. 1.

Identify by its ordinary commercial name each different good or service on or in connection with which Applicant has used, now uses, or intends to use the Subject Mark.

#### RESPONSE:

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that it has yet to begin use of this mark in commerce. FKA intends to use THE BEAUTY OF SLEEPING WELL in connection with the following goods: pillows and cushions, mattresses, mattress toppers, mattress cushions, pillow accessories, namely, cases, covers, slip, mattress pads and mattress covers.

### INTERROGATORY NO. 2.

For each good or service, the identification of which is requested in answer to Interrogatory 1, describe each different class or type of actual and intended purchasers and users.

#### RESPONSE:

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Further, FKA the interrogatory is objectionable for the burden it imposes upon FKA, calling for confidential and proprietary information of FKA. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide, based on available records, the requested information.

**INTERROGATORY NO. 3.**

For each good or service, the identification of which is requested in answer to Interrogatory 1, describe each different channel of trade or distribution through which the good or service has been, is, or is intended to be, provided.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Further, FKA the interrogatory is objectionable for the burden it imposes upon FKA, calling for confidential and proprietary information of FKA. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide, based on available records, the requested information.

**INTERROGATORY NO. 4.**

For each good or service, the identification of which is requested in answer to Interrogatory 1, describe in general terms the nature of all advertising and/or promotion of any kind that Applicant has sponsored including in any print, electronic, audio, or visual media, and all trade shows, promotional events, or meetings with third parties at which Applicant has displayed or promoted or plans, intends, or is scheduled to display or promote, Applicant's goods or services under the Subject Mark.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Further, FKA the interrogatory is objectionable for the burden it imposes upon FKA, calling for confidential and proprietary information of FKA. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide, based on available records, the requested information.

**INTERROGATORY NO. 5**

Describe with specificity all market research that Applicant has performed or which has been performed on its behalf with respect to each good or service, the identification of which is requested in answer to Interrogatory 1.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Further, FKA the interrogatory is objectionable for the burden it imposes upon FKA, calling for confidential and proprietary information of FKA. Upon entry of a suitable form of protective order safeguarding the confidential status of this information, FKA will provide, based on available records, the requested information.

**INTERROGATORY NO. 6**

Describe with specificity each instance, of which Applicant is aware, of confusion on the part of any person regarding whether Applicant's goods are made, sold, sponsored, licensed, or endorsed by, or otherwise are related to, Opposer, or vice-versa, including, but not limited to, the identity of each person confused, mistaken, or deceived, and the identity all persons having knowledge thereof.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that it is not aware of any instances of confusion.

**INTERROGATORY NO. 7**

Identify each person who supplied information or documents used in responding to any of the foregoing interrogatories or to "Opposers' First Request For Production of Documents and Things," and identify for each person the number(s) of the interrogatory or interrogatories and/or requests for which such person supplied information.

**RESPONSE:**

FKA identifies Jin Palmer, who provided information for responses to Interrogatories 1-6 and Document Requests 1-7.

**INTERROGATORY NO. 8**

Describe with specificity the factual basis for Applicant's allegations as pleaded in its Affirmative Defenses, and identify each person who is knowledgeable about such facts.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that Opposer does not have rights to stop the use of the words "BEAUTY" and "SLEEP" in another's trademark based on the relative weakness of the terms in view of the coexistence of several third party registrations on the Federal Register.

The terms "BEAUTY" and "SLEEP" are not exclusive source identifiers of Opposer or Opposer's goods. As such, it is unlikely that consumers will confuse Applicant's Mark with Opposer's Marks. Applicant's Mark creates a distinct commercial impression from that created by Opposer's Marks. Further, the Subject Mark is related to FKA's series of U.S. Trademark Registrations for THE BEAUTY OF LIVING WELL, including U.S. Trademark Registration Nos. 2,599,044 and 2,646,745 in International Class 20, such that consumers are likely to find the Subject Mark and FKA's registrations, not Opposer's Marks, closely related.

FKA further states that Opposer is barred by accord and satisfaction, estoppel, agreement, and/or waiver in view of an agreement entered into between counsel for Opposer, Peter M. Brody, and FKA, Mark A. Cantor and Matthew R. Mowers. Opposer's counsel, in verbal negotiations with FKA's counsel, agreed that Opposer would not contest the Subject Mark if FKA abandoned its rights to the marks BEAUTYRX (Application Serial No. 78/738,152) and BEAUTY PRESCRIPTION (Application Serial No. 78/738,202). FKA abandoned its rights to the above-identified applications on September 18, 2006 in reliance on this agreement. Opposer's filing of this opposition proceeding directly violates the agreement between the parties.

**INTERROGATORY NO. 9**

If you intend to rely in any way in this proceeding on the fact of your prior use or registration of THE BEAUTY OF LIVING WELL, describe how you intend to so rely and the basis on which you believe you are entitled to rely.

**RESPONSE:**

FKA objects to this interrogatory as overly broad, unduly burdensome and that it seeks information not reasonable calculated to lead to the discovery of admissible evidence. Subject to and without waiver of the foregoing general and specific general objections, FKA states that the Subject Mark is closely related to FKA's U.S. Trademark Registrations for THE BEAUTY OF LIVING WELL, including U.S. Trademark Registration No. 2,599,044 in International Class 20 for use in connection with "pillows; chair with massaging device in cushion; pillows and cushions; inflatable cushions; back support cushions; electric massage device in the form of a cushion," and U.S. Trademark Registration No. 2,646,745 in International Class 20 for use in connection with "unattached automobile seat cushions." These two registrations protect goods that are closely related to the goods covered by the application for the Subject Mark.

FKA additionally owns the following U.S. Trademark Registrations for THE BEAUTY OF LIVING WELL:

<u>U.S. Reg. No.</u>	<u>International Class</u>
2,595,648	11
2,595,694	8
2,583,588	11
2,691,461	9
2,825,539	10, 11

FKA has developed significant goodwill associated with its use of THE BEAUTY OF LIVING WELL in connection with its goods and services, especially in connection with goods covered by U.S. Trademark Reg. Nos. 2,599,044 and 2,646,745 in International Class 20. The Subject Mark and FKA's THE BEAUTY OF LIVING WELL registrations are closely related marks that acts as source identifiers exclusively of FKA's goods and services and are not likely to be confused with Opposer's Marks, Opposer's goods or services or any third party rights. As such, FKA does not believe that there is any likelihood of confusion, mistake or deception with respect to the intended use of the Subject Mark by FKA and Opposer's Marks.

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: June 4, 2007

**CERTIFICATE OF SERVICE**

I certify that I served:

**APPLICANT'S RESPONSE TO OPPOSER'S FIRST SET OF  
INTERROGATORIES (NOS. 1-9)**

on **June 4, 2007** by:

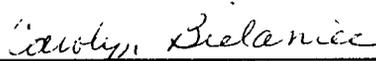
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a copy to:

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Washington, D.C. 20005

*Attorneys for Opposer*

  
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**CAROLYN BIELANIEC**