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

Proceeding	91240230
Party	Defendant Krypton Vision, Inc.
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

Reichert, Inc.,

*Opposer,*

v.

Krypton Vision, Inc.,

*Applicant.*

Opposition No. 91240230

Mark: IWAVEPHOROPTER

Serial No. 86946557

Filing Date: March 20, 2016

**ANSWER TO NOTICE OF OPPOSITION,  
AND AFFIRMATIVE DEFENSES**

Applicant Krypton Vision, Inc. (“Applicant”), by and through its attorneys identified below, for its Answer to the Notice of Opposition filed by Reichert, Inc. (“Opposer”) states as follows.

To the extent not explicitly admitted, all allegations in the Notice of Opposition are denied.

**REQUEST FOR SUSPENSION BY OPPOSER**

Regarding the unnumbered paragraphs under the section heading “Preliminary Statement and Request for Suspension” in the Notice of Opposition, please see the “Related Cancellation Proceeding” section at the end of this Answer for Applicant’s response to Opposer’s request for suspension.

**ANSWER**

1. Applicant has insufficient facts, knowledge and information to admit or deny Opposer's belief as stated in paragraph 1 in the Notice of Opposition. Applicant

denies that allowing Serial No. 86946557, for IWAVEPHOROPTER (“the Mark”), to proceed to registration will cause Opposer damage.

2. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 2 in the Notice of Opposition.

3. In response to paragraph 3 in the Notice of Opposition, Applicant admits it is a Delaware corporation with business address of 4110 Clipper Court, Fremont, California 94538.

4. In response to paragraph 4 in the Notice of Opposition, Applicant admits (a) it filed U.S. Trademark Application Serial No. 86946557 for IWAVEPHOROPTER listing eye testing machines and apparatus in Class 10 on March 20, 2016, (b) the filed application was published for opposition on December 5, 2017, and (c) a request to extend time to oppose was granted.

5. In response to paragraph 5 in the Notice of Opposition, Applicant incorporates by reference paragraphs 1 through 4 as if fully set forth herein.

6. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 6 in the Notice of Opposition, and therefore denies the same.

7. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 7 in the Notice of Opposition, and therefore denies the same.

8. Applicant has insufficient facts, knowledge and information to admit or deny each and every other allegation contained in paragraph 8 in the Notice of Opposition, and therefore denies the same.

9. Applicant has insufficient facts, knowledge and information to admit or deny each and every other allegation contained in paragraph 9 in the Notice of Opposition, and therefore denies the same.

10. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 10 in the Notice of Opposition, and therefore denies the same.

11. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 11 in the Notice of Opposition, and therefore denies the same.

12. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 12 in the Notice of Opposition, and therefore denies the same.

13. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 13 in the Notice of Opposition, and therefore denies the same.

14. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 14 in the Notice of Opposition, and therefore denies the same.

15. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 15 in the Notice of Opposition, and therefore denies the same.

16. Applicant denies each and every allegation or legal conclusion contained in paragraph 16 in the Notice of Opposition.

17. Applicant denies each and every allegation or legal conclusion contained in paragraph 17 in the Notice of Opposition.

18. Applicant denies each and every allegation or legal conclusion contained in paragraph 18 in the Notice of Opposition.

19. Applicant denies each and every allegation or legal conclusion contained in paragraph 19 in the Notice of Opposition.

20. Applicant denies each and every allegation or legal conclusion contained in paragraph 20 in the Notice of Opposition.

21. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 21 in the Notice of Opposition, and therefore denies the same.

22. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 22 in the Notice of Opposition, and therefore denies the same.

23. In response to paragraph 23 in the Notice of Opposition, Applicant incorporates by reference paragraphs 1 through 22 as if fully set forth herein.

24. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 24 in the Notice of Opposition, and therefore denies the same.

25. Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 25 in the Notice of Opposition, and therefore denies the same.

26. Applicant denies the allegation in paragraph 26 in the Notice of Opposition that Opposer's Mark is famous. Applicant has insufficient facts, knowledge and information to admit or deny each and every remaining allegation contained in paragraph 26 in the Notice of Opposition, and therefore denies the same.

27. Applicant denies each and every allegation or legal conclusion contained in paragraph 27 in the Notice of Opposition.

28. Applicant denies each and every allegation or legal conclusion contained in paragraph 28 in the Notice of Opposition.

29. Since Applicant does not know what Opposer means by "connected", "affiliated" or "close approximation", Applicant has insufficient facts, knowledge and information to admit or deny each and every allegation or legal conclusion contained in paragraph 29 in the Notice of Opposition, and therefore denies the same.

30. Applicant denies each and every allegation or legal conclusion contained in paragraph 30 in the Notice of Opposition.

31. Applicant denies each and every allegation or legal conclusion contained in paragraph 31 in the Notice of Opposition.

## **AFFIRMATIVE DEFENSES**

Applicant expressly reserves the right to plead additional affirmative and other defenses should any such defenses be revealed by discovery in this Opposition. As and for its affirmative and other defenses, Applicant states as follows:

### **First Affirmative Defense**

Opposer fails to state a claim upon which relief can be granted.

### **Second Affirmative Defense**

There is no likelihood of confusion, mistake or deception between the Mark and Opposer's alleged trademark of "PHOROPTOR" because, *inter alia*, the Mark and the alleged trademark of Opposer are not confusingly similar.

### **Third Affirmative Defense**

The alleged trademark of Opposer is generic for the goods offered under the alleged trademark of Opposer.

### **Fourth Affirmative Defense**

In the alternative, the alleged trademark of Opposer is merely descriptive of the goods offered under the alleged trademark of Opposer. The alleged trademark of Opposer also lacks acquired distinctiveness.

### **Fifth Affirmative Defense**

Alternatively, the alleged trademark of Opposer is weak and entitled to a narrow scope of protection since third parties have used the same or similar marks for the same of similar goods. Any similarity between the Mark and the alleged trademark of Opposer is restricted to that portion of the Mark consisting of the word "phoroptor" or "phoropter". As a result, under the antidissection rule any second meaning Opposer may

have in the alleged trademark of Opposer is narrowly circumscribed to the exact trademark alleged and does not extend to any other feature beyond the word “phoroptor” or “phoropter”.

#### **Sixth Affirmative Defense**

Applicant alleges on information and belief that the alleged trademark of Opposer has been abandoned due to a course of conduct that has caused the alleged trademark of Opposer to lose significance as an indication of source, including but not limited to failure to police third-party use of the term over a significant period of time.

#### **Seventh Affirmative Defense**

Applicant alleges on information and belief that Opposer’s registration for PHOROPTOR under Reg. No. 0150787 is void due to willful false statements made by Opposer in connection with maintaining the registration, including but not limited to falsely declaring that Opposer is the owner of the term “phoroptor” for the claimed goods, while knowing that the term has been extensively used by third-parties over a significant period of time to generically refer to the claimed goods.

#### **Eighth Affirmative Defense**

Applicant alleges on information and belief that Opposer’s registration for PHOROPTOR under Reg. No. 0150787 is void due to one or more improper transfer(s) of rights in connection with the assignment of the alleged trademark of Opposer and the registration.

#### **Ninth Affirmative Defense**

Any and all acts alleged to have been committed by Applicant were performed with lack of knowledge and lack of willful intent.



**RELATED CANCELLATION PROCEEDING**

Opposer's alleged trademark of PHOROPTOR, as it applies to U.S. Reg. No. 0150787, has been asserted by Opposer as the basis of the instant Opposition. U.S. Reg. No. 0150787 is the subject of Cancellation proceeding no. 92066454.

Opposer has requested that the instant Opposition be suspended pending the outcome of Cancellation proceeding no. 92066454. Applicant agrees with Opposer.

WHEREFORE, Applicant prays as follows:

- (a) this opposition be dismissed; and
- (b) a registration for the Mark be issued to Applicant

Dated: April 30, 2018

Respectfully submitted,

By: / Kyle M. Pendergrass /

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*Attorneys for Applicant,  
Krypton Vision, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that a true and complete copy of the foregoing ANSWER and AFFIRMATIVE DEFENSES was served upon the following counsel of record on this 30th day of April, 2018, as follows:

VIA FIRST-CLASS MAIL and VIA E-MAIL

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CERTIFICATE OF ELECTRONIC FILING

I hereby certify that this submission (along with any paper referred to as being attached or enclosed) is being filed with the United States Patent & Trademark Office via the Electronic System for Trademark Trials and Appeals (ESTTA) on this 30th day of April, 2018, as follows:

Dated: April 30, 2018

Respectfully submitted,

By: / Kyle M. Pendergrass /

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