

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

<p>WISEFAME INTERNATIONAL LTD. and IFM INTERNATIONAL, INC.</p> <p>Plaintiffs</p> <p>v.</p> <p>FKA DISTRIBUTING CO. DBA HOMEDICS-U.S.A., INC.</p> <p>Defendant.</p>	<p>Civil Action No. 1:08-CV-02468-WSD</p>
--	---

AMENDED COMPLAINT FOR DECLARATORY JUDGMENT

Plaintiffs Wisefame International Ltd., (“Wisefame”) and IFM International, Inc. (“IFM”) file this Amended Complaint for Declaratory Judgment against Defendant FKA Distributing Co. d/b/a HoMedics-U.S.A., Inc. (“Defendant” or “HoMedics”), and show this Court as follows.

NATURE OF THE ACTION

1. This is an action for declaratory judgment arising under the patent laws of the United States, 35 U.S.C. § 101 et seq. and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202, seeking a declaratory judgment of non-infringement of United States Patent No. 7,128,721 (the “721 Patent”) relating to

the art of portable body massagers (a copy of the '721 Patent is attached as Exhibit "A").

THE PARTIES

2. Plaintiff Wisefame is a corporation organized and existing under the laws of the Peoples Republic of China with its United States principal place of business and its United States office located in the Atlanta Division of the United States District Court for the Northern District of Georgia at 9211 Rose Avenue, Douglasville, Georgia 30134.

3. Plaintiff IFM is a corporation organized and existing under the laws of Georgia with its principal place of business in the Atlanta Division of the United States District Court for the Northern District of Georgia at 9211 Rose Avenue, Douglasville, Georgia 30134. IFM is a wholly owned subsidiary of Wisefame. IFM sells and markets products (including portable body massagers) in the United States that are manufactured by and purchased from Wisefame.

4. On or about January 8, 2008, Wisefame licensed IFM as the sole licensee of Wisefame in the United States, exclusive as to third parties to sell and market Wisefame's products, including the portable body massager products accused of infringement by HoMedics as set forth below.

5. Upon information and belief, Defendant FKA Distributing Co. d/b/a HoMedics-U.S.A., Inc. is a corporation organized and existing under the

laws of the state of Michigan with its principal place of business at 3000 Pontiac Trail, Commerce Township, Michigan 48390. Upon information and belief, Defendant HoMedics has sold products nationwide including sales to retailers located within this District. Further, upon information and belief, Defendant HoMedics' massage and other products are available nationwide at major department, mass market, discount drug and specialty stores located in this District.

JURISDICTION AND VENUE

6. This court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338 and pursuant to 28 U.S.C. §§ 2201 and 2202.

7. This Court has personal jurisdiction over Defendant HoMedics as, upon information and belief, it has engaged in systematic activities within the District.

8. Both FKA Distributing Co. and its d/b/a HoMedics-U.S.A., Inc may be served through their registered agent, Mr. Roman Ferber, 3000 Pontiac Trail, Commerce Township, Michigan 48390.

9. Venue is proper in the Northern District of Georgia pursuant to 28 U.S.C. §§ 1391(b) and (c).

OPERATIVE FACTS

10. The face of the '721 Patent lists HoMedics, Inc. as the Assignee.

11. Wisefame and IFM directly compete with HoMedics in the market for sales of portable body massagers. Wisefame and IFM have sold and/or offered for sale the portable body massagers accused by HoMedics of infringement in the United States including in and/or from this District and Division in Georgia.

12. On April 8, 2008, HoMedics caused its counsel to send a letter to Wisefame's current customer Wal-Mart Stores, Inc. ("Wal-Mart") identifying the '721 Patent, which relates to the art of portable body massagers, and asserting: "There are sources in China who are offering infringing products for sale, the most prominent of which is a company by the name of Wisefame." HoMedics also informs Wal-Mart that it is no longer doing business with Wisefame because of "numerous problems, including, but not limited to, quality problems with their production." Additionally, the letter purports to advise Wal-Mart of HoMedics' rights under the "U.S. patent laws" and identifies only one U.S. patent, the '721 Patent. The letter further states that its purpose is ensure that Wal-Mart is "formally advised of [HoMedics'] intellectual property rights." A copy of this letter is attached as Exhibit "B".

13. On or about July 17, 2008, Wal-Mart wrote to Wisefame enclosing Exhibit B and demanding assurances of non-liability for alleged infringement of the '721 Patent and questioning whether certain portable body massagers manufactured by Wisefame and sold to Wal-Mart should be removed from Wal-Mart's shelves. A copy of the letter from Wal-Mart is enclosed as Exhibit C. Significantly, the letter refers both to future sales and to sales that have already occurred. *See* paragraphs 1 and 3 of Exhibit C. Wal-Mart understood the letter to it from HoMedics, Exhibit B, to be an accusation of infringement of existing products being sold to Wal-Mart by Wisefame.

14. Wisefame intentionally designed the back massager product sold to Wal-Mart and otherwise sold or offered for sale by Wisefame and/or IFM, so that Wisefame's back massager product sold to Wal-Mart and otherwise sold or offered for sale by Wisefame and/or IFM does not infringe any valid claim of the '721 Patent.

15. Each of the independent claims of the '721 Patent—claims 1, 14, 17, 22, 26, 27, and 28—includes a limitation that reads substantially in part as follows: “each of the at least a pair of massage members being supported by the carriage for rotation relative to the carriage” [claim 1, 22, 26, 27, 28] or “at least a pair of massage members each supported by the carriage for rotation relative to the carriage” [claims 14, 17].

16. In contrast, massage heads of the portable body massagers sold to Wal-Mart and otherwise sold or offered for sale by Wisefame and/or IFM, among other differences required by the claims, have no rotation relative to the carriage as claimed in the '721 Patent.

17. On February 27, 2008, Wisefame and IFM filed suit in this Division and District to correct inventorship of the '721 Patent. The case is captioned *Wisefame International LTD et al v. FKA Distributing Co.*, Civil Action No. 1:08-cv-00641-WSD and is currently pending before this Court. The allegations and averments set forth therein are incorporated by reference as if fully set forth herein.

18. In 2001, Mr. JianHong Zhong, an employee of Wisefame invented a back massage cushion apparatus that was known at Wisefame as the SC-1. Mr. Zhong continued to develop and refine the kneading/massage mechanism that was part of the SC-1.

19. On December 13, 2002 Wisefame applied for a Chinese patent on Mr. Zhong's invention and on November 26, 2003, Chinese Patent No. 02250262.9 claiming that invention issued to Wisefame. Accordingly, Wisefame is the owner of all right, title and interest in and to this back massage cushion.

20. This same design that was patented in China and invented by Mr. Zhong was then incorporated by Wisefame into the product that was later sold to

HoMedics through Jedersun International Co. ("JDS") under HoMedics' model number SBM-200 among others.

21. On April 30, 2004, over sixteen (16) months after Wisefame filed the patent application that issued as Chinese Patent No. 02250262.9, HoMedics filed U.S. Patent Application No. 10/836,905 which issued on October 31, 2006 as the '721 Patent.

22. The massage mechanism claimed and disclosed in the '721 Patent is substantially identical to the mechanism invented by Mr. Zhong and owned by Wisefame that is claimed and disclosed in the earlier Chinese Patent No. 02250262.9.

23. As a result, Mr. Zhong is the sole inventor or a co-inventor with one or both of the named inventors on the '721 Patent. On information and belief, the named inventors on the '721 Patent inadvertently omitted Mr. Zhong as an inventor on the application that matured into the '721 Patent. Further on information and belief, this was done without deceptive intent on their part. Mr. Zhong and Wisefame were not aware of the application filed in the United States that matured into the '721 Patent and Mr. Zhong's inadvertent omission as an inventor was done without deceptive intention on his part.

24. By virtue of Wisefame's ownership of all right, title and interest in and to Mr. Zhong's invention that is disclosed and claimed in the '721 Patent,

Wisefame is the owner or a co-owner with HoMedics of all right, title and interest in the '721 Patent.

25. Accordingly, either because the claims of the '721 Patent do not read on Wisefame's and IFM's products accused of infringement, or because Wisefame is an owner or co-owner of the '721 Patent, HoMedics' claims of infringement made to Wal-Mart are without basis in law or fact.

26. As a result of HoMedics' actions accusing Wisefame's products of infringement that are sold or offered for sale by Wisefame and/or IFM, and Wal-Mart's demand for assurances, there is a substantial controversy, between Wisefame and IFM on the one hand and HoMedics on the other hand, which parties have adverse legal interests, of sufficient immediacy to warrant the issuance of a declaratory judgment of non-infringement.

COUNT I

DECLARATORY JUDGMENT OF NON-INFRINGEMENT - '721 PATENT

27. Plaintiffs incorporate by reference as if fully set forth herein the averments and allegations set forth in paragraphs 1 through 26, above.

28. There exists a substantial controversy between the parties as to whether Wisefame's and IFM's massage products accused of infringement by HoMedics, infringe any valid claim of the '721 Patent since none of the claims of

the '721 Patent reads on Wisefame's and IFM's massage products accused of infringement by HoMedics.

29. As a result, Wisefame's and IFM's accused products do not now and have not ever infringed any valid claim of the '721 Patent.

30. Accordingly, Wisefame and IFM are entitled to a declaratory judgment of non-infringement of the '721 Patent and other appropriate remedies, including recovery of their reasonable attorney's fees.

COUNT II

DECLARATORY JUDGMENT OF NON-INFRINGEMENT - '721 PATENT

31. Plaintiffs incorporate by reference as if fully set forth herein the averments and allegations set forth in paragraphs 1 through 30, above.

32. There exists a substantial controversy between the parties as to whether Wisefame's and IFM's massage products accused of infringement by HoMedics, infringe any claim of the '721 Patent since Wisefame is an owner or a co-owner of the '721 Patent and an owner or co-owner cannot infringe the '721 Patent.

33. As a result, Wisefame's and IFM's accused products cannot and could not infringe any claim of the '721 Patent.

34. Accordingly, Wisefame and IFM are entitled to a declaratory judgment of non-infringement of the '721 Patent and other appropriate remedies, including recovery of their reasonable attorney's fees.

WHEREFORE, Plaintiffs pray that this Court:

- (1) Declare that Wisefame and IFM do not infringe the '721 Patent;
- (2) Declare this to be an exceptional case within the meaning of 35 U.S.C. § 285 and award Plaintiffs their reasonable attorney's fees.
- (3) Grant Plaintiffs such other and further relief as the Court deems appropriate, just, and proper, premises considered.

Respectfully submitted,

/s/ John P. Fry

John P. Fry

Georgia Bar No. 278705

Tim Tingkang. Xia

Georgia Bar No.779609

W. Andrew McNeil

Georgia Bar No. 498636

MORRIS, MANNING & MARTIN, LLP

1600 Atlanta Financial Center

3343 Peachtree Road, NE

Atlanta, Georgia 30326

Telephone: (404) 233-7000

Fax: (404) 365-9532

Counsel for Plaintiffs

/s/ John P. Fry

John P. Fry

Georgia Bar No. 278705

Tim Tingkang. Xia

Georgia Bar No.779609

W. Andrew McNeil

Georgia Bar No. 498636

MORRIS, MANNING &

MARTIN, LLP

1600 Atlanta Financial Center

3343 Peachtree Road, NE

Atlanta, Georgia 30326

Telephone: (404) 233-7000

Fax: (404) 365-9532

Counsel for Plaintiffs