

FILED IN CLERK'S OFFICE

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

OCT 06 2005

By: *[Signature]* Clerk  
Deputy Clerk

OPELLA LTD,	)	
	)	
Plaintiff,	)	
	)	Civil Action No
v	)	
	)	
OPELLA, INC and RON SVENSSON,	)	
	)	
Defendants	)	
_____	)	

1 05 - CV 2585

**CAP**

COMPLAINT

Plaintiff Opella Ltd, for its Complaint against Defendants Opella, Inc and Ron Svensson, show the Court as follows

THE PARTIES

1 Plaintiff Opella Ltd ("Plaintiff") is a corporation organized and existing under the laws of the United Kingdom, with a principal place of business in Hereford, England, United Kingdom

2 Upon information and belief, Defendant Opella, Inc is a corporation organized and existing under the laws of the State of Georgia, with its principal place of business at 1150 Cobb International Place, Suite E, Kennesaw, Georgia

30152 Upon further information and belief, Opella, Inc may be served through

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_____	_____

service upon its registered agent Joseph V Myers III, 1545 Peachtree Street, N E , Suite 700, Atlanta, Georgia 30309

3 Upon information and belief, Defendant Ron Svensson (“Svensson”) is Chief Executive Officer and controlling shareholder of Opella, Inc and resides at 4362 Oakdale Vinings Cir S.E , Smyrna, Georgia 30080. Upon further information and belief, Svensson can be served at his residence or at the principal place of business of Opella, Inc

4. In his capacity as Chief Executive Officer and controlling shareholder of Opella, Inc., Svensson directs the activities of Opella, Inc and has personally participated in and caused Opella, Inc. to engage in the acts complained of herein

#### **JURISDICTION AND VENUE**

5 This is an action for patent infringement in violation of 35 U S C § 271; for trade dress infringement in violation of 15 U S.C § 1125, for unfair competition in violation of the common law of Georgia, and for breach of contract

6 This Court has subject matter jurisdiction over this Complaint pursuant to 28 U.S C § 1338(a), in that this Complaint arises under the patent and trademark laws of the United States.

7. This Court also has subject matter jurisdiction over this Complaint pursuant to 28 U.S C § 1367

8 This Court has personal jurisdiction over Defendant Opella, Inc because it is a Georgia corporation and is subject to the personal jurisdiction of this Court

9 This Court has personal jurisdiction over Defendant Svensson because he resides in the State of Georgia

10. Venue is proper in this Court pursuant to 28 U S C § 1391 (b) and (c).

### **FACTS COMMON TO ALL COUNTS**

#### **A. Prior Relationship Between the Parties**

11 Plaintiff is engaged in the business of designing, manufacturing, distributing, marketing and selling plumbing products, fixtures, and accessories Plaintiff and its predecessors have been engaged in such business since at least as early as 1965.

12. In or about 1990, a company was formed under the name "Opella, Inc." to act as the United States distributor of products manufactured and distributed by a predecessor of Plaintiff called "Opella Ltd " The original Opella, Inc. company will be referred to as the "First Opella, Inc ", and Plaintiff's Opella, Ltd. predecessor will be referred to as the "First Opella Ltd."

13 From about 1990 to 2004, the First Opella, Inc was the exclusive distributor in the United States of plumbing products, fixtures and accessories manufactured by the First Opella Ltd

14 In or about 1991, Delta Engineering Holdings Ltd (“Delta Holdings”) acquired the First Opella, Inc. and the First Opella Ltd

15. Following such acquisition, the First Opella Ltd manufactured, promoted, distributed and sold plumbing products, fixtures, and accessories, and the First Opella, Inc distributed the First Opella Ltd’s products in the United States

16. All manufacture, distribution, promotion and sale of plumbing fixtures, products, and accessories by the First Opella Ltd and the First Opella, Inc were conducted on behalf of Delta Holdings and under Delta Holdings’ control and inured to the benefit of Delta Holdings

17. On March 4, 2003, the First Opella Ltd and the First Opella, Inc executed a Distribution Agreement A true and correct copy of the Distribution Agreement is attached as Exhibit A

18 Paragraph 12(a) of the Distribution Agreement provides “All trademarks, patents and designs relating to The Agreed Products are the exclusive

property of [the First] Opella Ltd save for the Opella logo and Opella name registered and owned by [the First] Opella Inc for use solely in the USA ”

19. Paragraph 3 of the Distribution Agreement defines the term “The Agreed Products” as.

- 1) Wastes and related accessories,
- ii) Drinks Dispense Faucets (excluding OEM business handled directly by [the First] Opella Ltd),
- iii) Other products specifically agreed in writing between the parties from time to time.

20 On March 5, 2003. Delta Holdings sold all assets relating to the business of the First Opella Ltd, including all patents, trade dress. and design rights, and the goodwill associated therewith, to Plaintiff

21 Plaintiff also assumed all of the First Opella Ltd’s rights and obligations under the Distribution Agreement

22. Following such sale, the First Opella, Inc continued to act as Plaintiff’s exclusive distributor of “The Agreed Products” pursuant to the terms of the Distribution Agreement

23 In July 2003, Plaintiff sent a notice to Delta Holdings that Plaintiff intended to terminate the Distribution Agreement due to a breach by the First

Opella, Inc Delta Holdings accepted termination of the Distribution Agreement on behalf of the First Opella, Inc. in August 2003.

24. In or about November 2003, Delta Holdings sold certain assets relating to the business of the First Opella, Inc , including the United States rights in and to the OPELLA trademark and the goodwill associated therewith, to Defendant Opella, Inc. Following the sale, Defendant Opella, Inc assumed all of the First Opella, Inc 's rights and obligations under the Distribution Agreement

25 Termination of the Distribution Agreement was effective April 30, 2004.

26 On July 2, 2004, Defendant Opella, Inc filed a lawsuit against Plaintiff styled *Opella, Inc v Opella Ltd, Civil Action No 1 04-CV-1907-BBM*, in the United States District Court for the Northern District of Georgia, alleging that Plaintiff was infringing Defendant Opella, Inc 's United States rights in the OPELLA mark, *inter alia*

27 On September 17, 2004. the parties entered into a Settlement and Release Agreement to resolve the lawsuit. The terms of such Agreement are confidential to the parties

**B. Plaintiff's Patent Rights**

28. In or about 1992, Lloyd Fergusson, Vice President of the First Opella, Inc., and Peter Taylor, Managing Director of the First Opella Ltd and President of the First Opella, Inc , jointly invented a garbage disposal assembly with decorative sink flange mask.

29. Mr Fergusson and Mr Taylor filed a patent application on such invention on January 8, 1992.

30. On February 1, 1992, Mr Fergusson and Mr Taylor assigned the application, all inventions and improvements disclosed in the application, and all patents resulting from such application or from a division, continuation or reissue of the application to Delta Holdings, the ultimate parent of the First Opella, Inc and the First Opella Ltd.

31 U.S. Patent No. 5,318,230 (“‘230 Patent”) on a “Garbage Disposal Assembly With Decorative Sink Flange Mask” duly and legally issued to Delta Holdings on June 7, 1994. A true and correct copy of the ‘230 Patent is attached as Exhibit B

32 Mr. Fergusson and Mr Taylor filed a continuation application of the ‘230 Patent on June 7, 1995, and that application duly and legally issued to Delta

Holdings as U S Patent No. 5,560,052 (“’052 Patent”) on October 1, 1996. A true and correct copy of the ‘052 Patent is attached as Exhibit C.

33 All right, title, and interest in and to the ‘230 and ‘052 Patents were assigned to Plaintiff when it acquired all of the assets relating to the business of the First Opella Ltd from Delta Holdings in March 2003.

**C. Plaintiff’s Trade Dress Rights**

34 Continuously since at least as early as 1992, Plaintiff and its predecessor Delta Holdings have manufactured, distributed, promoted and sold sink strainers and stoppers identified by a distinctive trade dress that features a unique swirl design (the “Trade Dress”)

35 A photograph of an Opella Ltd sink stopper showing the Trade Dress is attached as Exhibit D.

36 The Trade Dress was first adopted and used by Plaintiff’s predecessor Delta Holdings in or about 1992 through Delta Holdings’ wholly-owned subsidiaries the First Opella, Inc. and the First Opella Ltd.

37. All such use of the Trade Dress by the First Opella Ltd and the First Opella, Inc. inured to the benefit of Delta Holdings.

38. Delta Holdings sold all right, title and interest in and to the Trade Dress, together with the goodwill symbolized thereby, to Plaintiff in March 2003.



39 Continuously since 1992, Plaintiff and its predecessor Delta Holdings have advertised and promoted throughout the United States sink strainers and stoppers identified by the Trade Dress

40 As a result of the advertising and promotion of the Trade Dress by Plaintiff and its predecessor, the Trade Dress has become well known and widely accepted and respected by the consuming public and in the trade

41. As a further result of such advertising and promotion, the Trade Dress has become distinctive, identifying products emanating only from Plaintiff, and symbolizes extremely valuable goodwill, all as evidenced by sales of sink strainers and stoppers bearing the Trade Dress throughout the United States in excess of 1.4 million units since 1995

42. As a further result of such advertising and sales, the public has come to associate the Trade Dress with Plaintiff and recognizes Plaintiff as the source of high quality sink strainers and stoppers

**COUNT ONE**  
**PATENT INFRINGEMENT AGAINST DEFENDANTS**

43 The allegations of Paragraphs 1 to 42 are incorporated by reference and realleged as if fully set forth herein

44 Plaintiff Opella Ltd is the owner of all right, title and interest in and to the '230 and '052 Patents

45. The '230 and '052 Patents have been at all times since their dates of issue, valid and enforceable

46 Defendants have had actual knowledge of the '230 and '052 Patents since they issued in 1994 and 1996, respectively

47. Upon information and belief, without license or permission from Plaintiff, Defendants are importing, distributing, and selling disposer flange masks, which, when installed and used as part of a garbage disposal assembly, infringe the '230 and '052 Patents

48. A photograph of one of the disposer flange masks sold by Defendants is attached as Exhibit E

49 Those that have installed and used as part of a garbage disposal assembly the disposer flange masks sold by Defendants have directly infringed the '230 and '052 Patents.

50. Upon information and belief, Defendants are actively inducing others to infringe the '230 and '052 Patents and have thus infringed the Patents under 35 U.S.C. § 271(b).

51. The disposer flange masks sold by Defendants constitute a material part of the invention claimed in the '230 and '052 Patents

52. Defendants have both the knowledge and the intent that the disposer flange masks they import, distribute, promote and sell will be used in an infringing manner, and Defendants encourage and promote such disposer flange masks to be used in an infringing manner.

53 A true and correct copy of the installation instructions for one of Defendants' disposer waste assemblies, which includes the flange mask, is attached as Exhibit F.

54 Upon information and belief, Defendants are importing, distributing, promoting and selling disposer flange masks with knowledge that they are especially made or especially adapted for use in an infringement of the '230 and '052 Patents, and that they are not staple articles or commodities of commerce suitable for noninfringing use Defendants are therefore liable as contributory infringers under 35 U.S.C § 271(c)

55 Upon further information and belief, Defendant Svensson has actively aided and abetted Opella, Inc.'s infringement of the '230 and '052 Patents with knowledge that such conduct infringes the '230 and '052 Patents and is therefore liable for inducement of infringement under 35 U S C. § 271(b)

56. Upon information and belief, the acts of Defendants complained of herein have been committed intentionally and willfully

57 Upon information and belief, Defendants will not cease such tortious acts unless enjoined by this Court. Defendants' acts of inducement of infringement and contributory infringement have and will cause damage to Plaintiff. Plaintiff has no adequate remedy at law.

**COUNT TWO**  
**TRADE DRESS INFRINGEMENT**

58 The allegations of Paragraphs 1 to 57 are incorporated by reference and realleged as if fully set forth herein.

59. The Trade Dress has acquired a secondary meaning.

60. The Trade Dress has become an asset of substantial value as a symbol of Plaintiff, its quality products, and goodwill.

61. The Trade Dress is non-functional.

62. Defendants, with full knowledge of Plaintiff's rights in and to the Trade Dress, have intentionally adopted and begun using the Trade Dress on products of their own in Georgia and in interstate commerce in connection with the promotion and sale of sink strainers and stoppers. A photograph showing Defendants' use of Plaintiff's Trade Dress on a sink stopper is attached as Exhibit G.

63 The adoption and use by Defendants of Plaintiff's Trade Dress for sink strainers and stoppers creates a likelihood of customer confusion, deception and mistake as to the source and origin of Defendants' strainers and stoppers

64 Defendants' aforesaid acts tend to represent falsely that Defendants' goods are legitimately connected with Plaintiff and tend to designate falsely that Defendants' goods originate from Plaintiff, all of which constitute violations of section 43(a)(1) of the Lanham Act, 15 U S C. § 1125(a)(1)

65 Plaintiff has given notice to Defendants of their infringement of the Trade Dress and has requested that Defendants cease and desist from such infringing acts

66. Defendants' use of the Trade Dress on sink strainers and stoppers demonstrates a willful and bad faith intent to create confusion, deception, and mistake in the minds of Plaintiff's customers and potential customers and to trade on Plaintiff's goodwill by implying a similarity, identity, connection, or relationship between Defendants' products and business and those of Plaintiff

67 The aforesaid acts of Defendants are greatly and irreparably damaging to Plaintiff and will continue to be greatly and irreparably damaging to Plaintiff unless enjoined by this Court, as a result of which Plaintiff is without an adequate remedy of law

**COUNT THREE**  
**COMMON LAW UNFAIR COMPETITION AGAINST DEFENDANTS**

68 The allegations of paragraphs 1 to 67 are incorporated by reference and realleged as if fully set forth herein

69 Defendants' aforesaid acts constitute common law unfair competition as follows:

- (i) Said acts enable and will continue to enable Defendants to obtain the benefit of and trade on the goodwill of Plaintiff,
- (ii) Said acts damage and will continue to damage Plaintiff's goodwill in that Plaintiff does not have control over the business and products of Defendants
- (iii) Said acts have caused and are likely to continue to cause confusion, mistake or deception of the public. and
- (iv) Said acts will result in the unjust enrichment of Defendants

70 The aforesaid acts of Defendants are greatly and irreparably damaging to Plaintiff and will continue to be greatly and irreparably damaging to Plaintiff unless enjoined by this Court, as a result of which Plaintiff is without an adequate remedy at law

**COUNT IV**  
**BREACH OF CONTRACT AGAINST DEFENDANT OPELLA, INC.**

71 The allegations of paragraphs 1 to 70 are incorporated by reference and realleged as if fully set forth herein

72. The aforesaid acts of Opella, Inc. have caused the consuming public to believe that there is a current affiliation or relationship between Opella, Inc and Plaintiff in breach of the Settlement and Release Agreement

73 Plaintiff has been damaged by such breach

WHEREFORE, Plaintiff respectfully prays for the following relief

- (a) That judgment on the Complaint be entered for Plaintiff and against Defendants,
- (b) That Defendants, their officers, agents, servants, representatives, employees, attorneys, heirs, successors, assigns, and all persons acting in concert or participation with them, be permanently enjoined from
  - (i) using, importing, manufacturing, selling or offering to sell any disposer flange mask that can be used in a device or method that infringes the '230 and '052 Patents;
  - (ii) actively inducing any other person to infringe the '230 and '052 Patents,

- (iii) contributing to the infringement of the '230 and '052 Patents by others,
  - (iv) performing any further acts of infringement of the '230 and '052 Patents,
  - (v) using the Trade Dress or any colorable imitation of the Trade Dress on any of their products or in conjunction with the promotion, offering for sale or sale of any of their products.
  - (vi) otherwise infringing the Trade Dress, and
  - (vii) competing unfairly with Plaintiff in any manner
- (c) That Defendants be ordered to account to Plaintiff for the actual damages suffered by Plaintiff, the exact extent of which cannot be determined by Plaintiff;
- (d) That Plaintiff receive from Defendants three times the actual damages caused by Defendants' willful infringement of the '230 and '052 Patents;
- (e) That Plaintiff receive from Defendants three times the actual damages caused by Defendants' willful infringement of the Trade Dress and Defendants' profits from any sales of goods bearing the Trade Dress.



- (f) That Plaintiff be awarded damages for Defendant Opella, Inc.'s breach of the Settlement and Release Agreement.
- (g) That the Court find this case to be exceptional and award Plaintiff its reasonable attorney fees,
- (h) That Defendants be ordered to deliver up for destruction all products that infringe the '230 and '052 Patents, and all products that contain the Trade Dress, and any written or recorded material or advertisements in Defendants' possession containing the Trade Dress.
- (i) That Defendants be required in accordance with 15 U S C § 1115 to file with this Court and serve on Plaintiff within thirty (30) days from the date of any injunction a report in writing under oath, setting forth in detail the manner and form in which Defendants have complied with the terms of the injunction,
- (j) That Plaintiff be awarded its costs associated with bringing this action,
- (k) That Plaintiff be awarded prejudgment interest, and
- (l) That Plaintiff be granted such other and further relief as this Court may deem just and proper

**JURY DEMAND**

Opella Ltd respectfully requests a jury for the hearing of the causes of action set forth in this Complaint.

This 6th day of October, 2005

Respectfully submitted,

SMITH, GAMBRELL & RUSSELL, LLP



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